

Federal Firearms Law: Selected Developments in the Executive, Legislative, and Judicial Branches

November 3, 2021

Congressional Research Service

<https://crsreports.congress.gov>

R46958



R46958

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Firearm regulation in the United States is an area of shared authority between the federal, state, and local governments. At the federal level, firearm commerce, possession, and transfers are governed largely by two statutory regimes: the National Firearms Act of 1934 (NFA) and the Gun Control Act of 1968 (GCA). The NFA imposes stringent taxation and registration requirements for a specific set of statutorily defined “firearms” deemed to be especially dangerous, such as machineguns and short-barreled rifles. The GCA, which is more broadly applicable to most kinds of commonly available firearms, regulates the manufacture, transfer, and possession of firearms in multiple ways. Among other things, the GCA prohibits certain categories of persons from possessing or receiving firearms and requires individuals or entities “engaged in the business” of manufacturing or selling firearms to be federally licensed (referred to as FFLs). The GCA also obligates FFLs that manufacture firearms to identify each one by means of a serial number and requires FFLs that transfer firearms to conduct background checks on each prospective transferee. Current federal law does *not* require unlicensed persons who wish to make or assemble a firearm for personal use to stamp it with an identifying serial number, nor must such persons who wish to transfer a firearm from a personal collection or as a hobby conduct a background check on the person to whom the firearm is to be transferred.

Recent developments in all three branches of government could affect how these and other provisions of the NFA and GCA are interpreted and applied. In the executive branch, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), an agency within the U.S. Department of Justice (DOJ), has issued a proposed rule that would clarify when some larger pistols equipped with stabilizing or arm braces are considered short-barreled rifles subject to NFA requirements. Additionally, in an effort to mitigate the availability of so-called “ghost guns”—i.e., firearms that are not identifiable by means of a serial number or other information stamped on the firearm and that are thus more difficult to trace when used in crime—a second ATF proposed rule would, in part, amend regulatory definitions of the term “frame or receiver” (the principal firearm component to which a serial number is affixed) to require serial numbers for certain firearm component kits and incomplete frames and receivers. Beyond these two proposed rules, DOJ also recently published a model “red flag” law—essentially, a provision permitting a court to issue a temporary order barring a person at risk of gun violence from possessing a firearm—that states seeking to establish such laws may use as guidance.

In the legislative branch, three bills in the 117th Congress have passed the House of Representatives that would alter aspects of the current federal background check process and the categories of persons prohibited from possessing or receiving firearms. H.R. 8 would extend federal background check requirements to most private firearm transfers between unlicensed persons. H.R. 1446 would expand from three business days to a maximum of twenty business days the length of time an FFL must wait before transferring a firearm when a background check does not return a definitive answer regarding the legality of the transaction. Lastly, H.R. 1620 would, among other things, amend the categories of persons prohibited from possessing firearms based on conviction of a misdemeanor crime of domestic violence or entry of a protective order for the benefit of an “intimate partner,” among other things, to encompass crimes and orders related to persons in more casual dating relationships and to include a new category for misdemeanor stalking convictions.

Since the Supreme Court held that the Second Amendment, which protects a right “to keep and bear arms,” encompasses an individual right to possess firearms for self-defense in at least some circumstances, lower federal courts have reached disparate conclusions as to whether particular federal, state, and local firearm regulations impermissibly infringe on this right. For instance, a 2021 federal district court decision held that the state of California’s ban on certain semiautomatic firearms is unconstitutional, despite precedent from other circuits upholding similar restrictions. Additionally, the U.S. Court of Appeals for the Tenth Circuit recently struck down federal restrictions on licensed firearm transfers to persons under 21 years of age, briefly creating a circuit split. The Tenth Circuit’s decision subsequently has been vacated as moot. Finally, federal courts have split on the extent to which the possession of firearms in public can be constrained, and the Supreme Court is considering the issue in *New York State Rifle & Pistol Association v. Bruen*.

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Introduction

Firearms are “deeply ingrained in American society and the nation’s political debates.”¹ Guns are both a source of recreation and protection for many Americans² and involved in thousands of injuries and deaths on an annual basis.³ Federal, state, and local governments share authority to regulate firearm access, possession, and transfer in the United States. Individual states and localities have enacted a diverse range of laws relating to the possession, registration, and carrying of firearms, among other things.⁴ At the national level, federal law establishes a regulatory framework for the lawful manufacture, sale, and possession of firearms that serves as a baseline for permissible firearm use and transactions that state and local laws generally may not contradict.⁵ The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) within the Department of Justice (DOJ) has the authority to administer and enforce federal firearms laws.⁶ ATF serves both a law-enforcement function, investigating criminal violations of federal firearms laws, and an administrative and regulatory function, overseeing the licensing process for firearm manufacturers and dealers and issuing regulations and guidance regarding the application of firearm laws.⁷

Recent developments in all three branches of government could impact existing federal firearms laws in several ways. With respect to ATF, in accordance with the President’s April 2021 orders, the agency has issued proposed rules that would, in part, address ATF’s interpretation of firearm identification requirements and regulation of firearms equipped with certain braces.⁸ In 117th Congress, the House of Representatives has passed three bills that would, among other things,

¹ Katherine Schaeffer, *Key Facts about Americans and Guns*, PEW RESEARCH CTR. (May 11, 2021), <https://www.pewresearch.org/fact-tank/2021/05/11/key-facts-about-americans-and-guns/>.

² See *id.* (reflecting that in a survey of gun owners, most respondents cited personal safety or protection, hunting, or nonspecific recreation or sport as reasons for gun ownership).

³ See *FastStats: All Injuries*, CDC, NAT’L CTR. FOR HEALTH STATS., <https://www.cdc.gov/nchs/fastats/injury.htm> (last reviewed Apr. 9, 2021) (reflecting close to 40,000 firearm deaths from injury in 2019).

⁴ See *State Gun Laws*, NAT’L RIFLE ASS’N INST. FOR LEGIS. ACTION, <https://www.nraila.org/gun-laws/state-gun-laws/> (last visited Aug. 13, 2021).

⁵ See *Key Federal Regulation Acts*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/key-federal-regulation-acts/> (last visited Aug. 13, 2021); 18 U.S.C. § 927 (providing that the primary federal firearms restrictions are not intended to “operate[] to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict” between the two “so that the two cannot be reconciled or consistently stand together”).

⁶ 28 U.S.C. § 599A.

⁷ See *Firearms*, ATF, <https://www.atf.gov/firearms> (last visited Aug. 13, 2021) (referencing “integrated regulatory and enforcement” approach).

⁸ See *Fact Sheet: Biden-Harris Administration Announces Initial Actions to Address the Gun Violence Public Health Epidemic*, THE WHITE HOUSE (Apr. 7, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-gun-violence-public-health-epidemic/> [hereinafter “*Fact Sheet: Initial Actions*”]; *infra* “Executive Branch.” The Biden Administration and ATF have announced or undertaken several other initiatives to combat gun violence, including the formation of cross-jurisdictional firearms trafficking strike forces in “significant firearms trafficking corridors” like New York and Chicago, see *Department of Justice Announces Formation of Firearms Trafficking Strike Forces to Crack Down on Sources of Crime Guns*, DOJ (June 22, 2021), <https://www.justice.gov/opa/pr/departments-justice-announces-formation-firearms-trafficking-strike-forces-crack-down-sources>; and a stringent policy regarding licensure for firearms dealers who willfully violate federal law. For further information on these initiatives, detailed discussion of which is beyond the scope of this report, see *Fact Sheet: Biden-Harris Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety*, THE WHITE HOUSE (June 23, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety/>.

impact the federal background check process for transferring firearms and prohibitions on firearm possession related to domestic violence.⁹ Finally, courts continue to interpret the scope of the Second Amendment and the extent to which particular firearm regulations are constitutionally permissible. For instance, recent lower-court decisions have addressed the constitutionality of a federal law imposing age restrictions on firearms sales,¹⁰ state laws restricting the open carry of firearms,¹¹ and state laws restricting the manufacturing, distribution, and possession of assault weapons.¹² The Supreme Court is also reviewing a Second Amendment challenge to New York laws limiting the ability of citizens to acquire licenses to carry concealed firearms in public for self-defense.¹³ This report begins with a brief overview of relevant aspects of the current federal statutory regime governing firearms, before surveying the recent developments from the executive, legislative, and judicial branches and how those developments may affect existing federal firearms laws.

Relevant Federal Laws Governing Firearms¹⁴

The current collection of federal firearms laws may be thought of as a regulatory floor that sets out, at the federal level, the minimum requirements for lawful manufacture, sale, and possession of firearms. Most of the significant federal requirements regarding firearms are encompassed in the National Firearms Act of 1934 (NFA)¹⁵ and the Gun Control Act of 1968 (GCA),¹⁶ as amended.¹⁷ Many of these requirements are administered and interpreted by ATF through guidance and regulations.¹⁸ This report will provide a brief overview of the NFA's and GCA's statutory provisions that are relevant to recent developments in the executive, legislative, and judicial branches.

⁹ See Bipartisan Background Checks Act of 2021, H.R. 8, 117th Cong. (as passed by House, Mar. 11, 2021); Enhanced Background Checks Act of 2021, H.R. 1446, 117th Cong. (as passed by House, Mar. 11, 2021); Violence Against Women Act Reauthorization Act of 2021, H.R. 1620, 117th Cong. (as passed by House, Mar. 17, 2021).

¹⁰ *Hirschfeld v. ATF*, 5 F.4th 407 (4th Cir. 2021), *vacated as moot*, No. 19-2250, 2021 WL 4301564, at *2 (4th Cir. Sept. 22, 2021).

¹¹ *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc), *petition for cert. docketed*, No. 20-1639 (U.S. May 25, 2021).

¹² *Miller v. Bonta*, ___ F. Supp. 3d ___, No. 19-CV-1537, 2021 WL 2284132 (S.D. Cal. June 4, 2021), *appeal docketed*, No. 21-55608 (9th Cir. June 10, 2021).

¹³ *N.Y. State Rifle & Pistol Ass'n v. Corlett*, 141 S. Ct. 2566 (Mem. Op.) at *1 (Apr. 26, 2021) (order granting petition for writ of certiorari).

¹⁴ Portions of this section are adapted from CRS Report R45629, *Federal Firearms Laws: Overview and Selected Legal Issues for the 116th Congress*, by Michael A. Foster.

¹⁵ Pub. L. No. 73-474, 48 Stat. 1236 (1934).

¹⁶ Pub. L. No. 90-618, 82 Stat. 1213 (1968).

¹⁷ Certain additional federal laws addressing specific aspects of firearm use and commerce, such as the Arms Export Control Act (AECA) and implementing International Traffic in Arms Regulations (ITAR), 22 U.S.C. § 2778; 22 C.F.R. pts. 120-130, and the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901-03, are beyond the scope of this report. For more information on the PLCAA, see CRS Legal Sidebar LSB10292, *When Can the Firearm Industry Be Sued?*, by Michael A. Foster. For more information on the AECA and ITAR, see, e.g., CRS Report R46337, *Transfer of Defense Articles: Sale and Export of U.S.-Made Arms to Foreign Entities*, by Nathan J. Lucas and Michael J. Vassalotti.

¹⁸ See 18 U.S.C. § 926 (authorizing the Attorney General to prescribe “such rules and regulations as are necessary to carry out the provisions of” the chapter of the U.S. Code encompassing the GCA); 27 C.F.R. pts. 478, 479.

National Firearms Act of 1934

The NFA regulates the manufacture, transfer, and possession of certain enumerated¹⁹ weapons deemed to be “particularly dangerous”²⁰ and that were associated with a rise of violence connected to organized crime at the time the law was passed.²¹ The statute’s restrictions apply only to a few weapons specifically identified, which are defined as “firearms” under the Act.²² For instance, the NFA defines firearms as including short-barreled shotguns having a barrel length under 18 inches and short-barreled rifles having a barrel length under 16 inches.²³ The terms “rifle” and “shotgun,” in turn, are defined as “a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in” a fixed cartridge (in the case of a rifle) or a fixed shotgun shell (in the case of a shotgun) to fire in certain ways characteristic of the two kinds of firearms.²⁴ Additional categories of weapons that fall within the definition of firearm under the NFA are (1) modified shotguns or rifles with an overall length under 26 inches; (2) machineguns,²⁵ defined as weapons—including frames or receivers—that shoot “automatically more than one shot, without manual reloading, by a single function of the trigger,” as well as parts intended to convert other weapons into machineguns; (3) silencers; (4) “destructive devices,” including bombs, grenades, rockets, and mines; and finally (5) a catchall category of “any other weapon” that is “capable of being concealed on the person from which a shot can be discharged through the energy of an explosive,” among other things.²⁶

¹⁹ The NFA explicitly exempts from regulation antique firearms and other devices that are primarily “collector’s item[s]” not likely to be used as weapons. 26 U.S.C. § 5845(a), (g).

²⁰ *United States v. Posnjak*, 457 F.2d 1110, 1113 (2d Cir. 1972).

²¹ See Pub. L. No. 73-474, 48 Stat. 1236 (1934); 73 CONG. REC. 11,400 (1934) (statement of Rep. Robert L. Doughton) (“For some time this country has been at the mercy of gangsters, racketeers, and professional criminals. The rapidity with which they can go across state lines has become a real menace to the law-abiding people of this country. When the bill was first proposed by the Department of Justice it affected pistols and revolvers, but that provision was eliminated from the bill, and it now only relates to machine guns and sawed-off shotguns and rifles, or guns with barrels less than 18 inches in length, and to mufflers, and to silencers.”).

²² 26 U.S.C. § 5845(a).

²³ *Id.*

²⁴ *Id.* § 5845(c), (d).

²⁵ The Firearm Owners’ Protection Act of 1986 subsequently prohibited the possession and transfer of machineguns unless they are possessed by or transferred to or from federal or state authorities or were lawfully possessed before the effective date of the act (May 19, 1986). See 18 U.S.C. § 922(o). Thus, only machineguns manufactured and lawfully held prior to May 19, 1986, may be possessed and transferred today. *Id.* On December 26, 2018, the regulatory definition of *machinegun* was amended, for purposes of the NFA and GCA, to include bump-stock-type devices, i.e., devices that “allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger.” Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018). The rule became effective March 26, 2019, *id.*, though it has been the subject of several court challenges that are still ongoing. *Compare, e.g.,* *Aposhian v. Barr*, 958 F.3d 969, (10th Cir. 2020), *petition for cert. docketed*, No. 21-159 (U.S. Aug. 4, 2021) (concluding likelihood of success on challenge to rule had not been established), *and* *Guedes v. ATF*, 920 F.3d 1, 35 (D.C. Cir. 2019) (same), *with* *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 473 (6th Cir. 2021) (concluding challenge to rule was likely to succeed, as a bump stock cannot be classified as a machinegun within meaning of statute), *vacated and rehearing en banc granted*, 2 F.4th 576, 577 (6th Cir. 2021).

²⁶ 26 U.S.C. § 5845(a)-(b), (e)-(f). The catchall “any other weapon” category also includes “a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell” and “weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading” but specifically excludes pistols and revolvers with “rifled bores” or “weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.” *Id.* § 5845(e).

All NFA firearms that are produced or imported—as well as their manufacturers, dealers, or importers—must be authorized by and registered with the Attorney General.²⁷ Any transfer of an NFA firearm must likewise be accompanied by a registration in the name of the transferee.²⁸ The registrations of all NFA firearms not in the possession or under the control of the United States are maintained in a central registry,²⁹ and all persons possessing NFA firearms must retain proof of registration.³⁰ Any NFA firearm that is produced or imported must be identifiable: firearms that are not considered “destructive devices” must bear, among other things, a serial number that “may not be readily removed, obliterated, or altered,”³¹ while destructive devices are subject to marking requirements under separate regulations.³²

Beyond registration and identification requirements, the NFA subjects every importer, manufacturer, and dealer in NFA firearms to an annual “special (occupational) tax for each place of business,”³³ and a separate tax must also be paid for each firearm made.³⁴ Upon transfer of an NFA firearm, the transferor is subject to a tax, with the amount varying depending on whether the transferred firearm falls under the catchall category of “any other weapon.”³⁵ Violations of the NFA are subject to criminal penalties.³⁶

Gun Control Act of 1968

The GCA is not so much a single statute as it is a detailed statutory regime that has been supplemented regularly in the decades since its inception in 1968. Broadly speaking, the GCA, as amended, regulates the manufacture, transfer, and possession of most kinds of modern³⁷ firearms, extending to categories of weapons that fall outside the scope of the NFA. Under the GCA, a “firearm” is defined as “(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.”³⁸

²⁷ *Id.* §§ 5802, 5822, 5841(b)-(c). The Secretary of the Treasury previously had this responsibility.

²⁸ *Id.* §§ 5812, 5841(b)-(c).

²⁹ *Id.* § 5841(a). The registry is administered by the director of ATF. *See* 28 C.F.R. § 0.131(d).

³⁰ 26 U.S.C. § 5841(e).

³¹ *Id.* § 5842(a).

³² *Id.* § 5842(c); *see* 27 C.F.R. § 479.102(d) (permitting ATF director to authorize alternative means of identifying destructive devices upon receipt of written letter showing that “engraving, casting, or stamping (impressing) such a weapon would be dangerous or impracticable”).

³³ *Id.* § 5801.

³⁴ *Id.* §§ 5821-22.

³⁵ *Id.* §§ 5811-12. A number of tax exemptions exist. Most notably, firearms made by or transferred to the United States, any state, any political subdivision of a state, or any official police organization engaged in criminal investigations are exempted, *Id.* §§ 5852-5853, as are firearms made by or transferred between qualified manufacturers or dealers. *Id.* § 5852(c)-(d).

³⁶ *Id.* § 5871.

³⁷ “Antique” firearms—i.e., firearms manufactured in or before 1898 or certain muzzle-loading weapons designed to use black powder, among other things—are excluded from the definition of “firearm” for purposes of the GCA. 18 U.S.C. § 921(a)(3), (16).

³⁸ *Id.* § 921(a)(3). The term “frame or receiver” is not further defined in the GCA but is defined in regulation as “[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.” 27 C.F.R. § 478.11. As discussed in more detail *infra*, a recent ATF proposed rule would amend this definition.

In general terms, the GCA sets forth who can—and cannot—sell, purchase, and possess firearms; how those sales and purchases may lawfully take place; what firearms may lawfully be possessed; and where firearm possession may be restricted.³⁹ Some of the GCA’s major components and related supplementing statutes focus on prohibiting firearm possession, licensing requirements for firearm manufacturers and dealers, and background checks for firearm purchases.

The GCA regulates firearm possession by, among other things,⁴⁰ establishing categories of persons who, because of risk-related⁴¹ characteristics, may not possess or receive firearms.⁴² Specifically, it is unlawful for a person to ship, transport, possess, or receive any firearms or ammunition⁴³ if he or she: (1) is a felon⁴⁴; (2) is a fugitive from justice;⁴⁵ (3) is an unlawful user of, or is addicted to, a controlled substance⁴⁶; (4) has been adjudicated as a “mental defective” or committed to a mental institution; (5) has been admitted to the United States pursuant to a nonimmigrant visa⁴⁷ or is an unlawfully present alien; (6) has been dishonorably discharged from the Armed Forces; (7) has renounced his or her U.S. citizenship; (8) is subject to a court order preventing that person from harassing, stalking, or threatening an intimate partner (or that partner’s child) or engaging in other conduct that would cause the partner to reasonably fear bodily injury to himself or herself or the child; or (9) has been convicted of a misdemeanor crime of domestic violence.⁴⁸ Additionally, a person under indictment for a crime punishable by a term of imprisonment exceeding one year is not barred by the GCA from *possessing* a firearm but may not receive, ship, or transport a firearm.⁴⁹ Separate provisions also bar juveniles—persons under

³⁹ 18 U.S.C. § 922.

⁴⁰ A few *types* of firearms are also restricted (e.g., machineguns and undetectable firearms), *id.* § 922(o), (p), as is possession of firearms in certain *locations* (e.g., federal facilities and school zones in some circumstances), *id.* §§ 922(q), 930.

⁴¹ See *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983), *superseded by statute on other grounds as stated in* *Logan v. United States*, 552 U.S. 23, 27-28 (2007) (noting that the GCA’s possession prohibitions were intended “to keep firearms out of the hands of presumptively risky people”).

⁴² 18 U.S.C. § 922(g). A separate provision prohibits anyone from selling or otherwise disposing of a firearm if that person knows or has “reasonable cause” to believe that the prospective recipient fits into any of the above categories. *Id.* § 922(d).

⁴³ As an exercise of Congress’s Commerce Clause powers, the provision requires receipt, shipping, or transportation to be “in interstate or foreign commerce” and possession to be “in or affecting commerce.” *Id.* § 922(g).

⁴⁴ A felony is defined as a crime punishable by a term of imprisonment exceeding one year, with exceptions for criminal offenses relating to antitrust violations, unfair trade practices, restraints of trade, or “other similar offenses related to the regulation of business practices.” *Id.* § 921(a)(20)(A). Additionally, if a state classifies a particular offense as a misdemeanor and that crime is punishable by a term of imprisonment of two years or less, the offense does not count as a “crime punishable by a imprisonment for a term exceeding one year” for purposes of 18 U.S.C. § 922(g)(1). *Id.* § 921(a)(20)(B). Finally, a person is not considered “convicted” for purposes of the prohibition if his or her conviction has been expunged or set aside or if the person has been pardoned or had his or her rights restored, unless the relevant order expressly provides otherwise. *Id.*

⁴⁵ The GCA defines *fugitive from justice* as “any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.” *Id.* § 921(a)(15).

⁴⁶ The term *controlled substance* is defined in Section 102 of the Controlled Substances Act, 21 U.S.C. § 802.

⁴⁷ The prohibition is subject to exceptions, such as for aliens admitted “for lawful hunting or sporting purposes” or in possession of lawfully issued hunting licenses or permits. 18 U.S.C. § 922(y)(2). Any alien admitted to the United States under a nonimmigrant visa may also petition to have the prohibition waived. *Id.* § 922(y)(3).

⁴⁸ A misdemeanor crime of domestic violence is defined as an offense that is a misdemeanor under federal, state, or tribal law and “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” *Id.* § 921(a)(33).

⁴⁹ *Id.* § 922(n).

18 years of age—from knowingly possessing handguns and handgun ammunition,⁵⁰ and licensed firearm dealers may not knowingly sell or deliver (1) any firearms or ammunition to minors, or (2) firearms other than shotguns or rifles (or ammunition for the same) to persons under the age of 21.⁵¹

The GCA additionally regulates the manufacture and sale of firearms by, among other things,⁵² requiring persons and organizations “engaged in the [firearms] business”—that is, importers, manufacturers, and dealers—to obtain a license from the federal government and pay an annual fee.⁵³ These persons and entities are commonly known as Federal Firearm Licensees, or FFLs.⁵⁴ Manufacturers are considered to be “engaged in the business” if they “devote time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of firearms manufactured.”⁵⁵ Dealers are considered to be “engaged in the business” if they “devote[] time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.”⁵⁶ The term “with the principal objective of livelihood and profit” means “that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.”⁵⁷ Thus, a person is not “engaged in the business” of dealing in firearms if that person “makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.”⁵⁸ Overall, whether a person or entity is “engaged in the business” of dealing in firearms under the GCA is a fact-specific question that is dependent on the particular circumstances of the case.⁵⁹ Relevant factors include (1) the quantity and frequency of firearms sales; (2) sale location; (3) how the sales occurred;

⁵⁰ *Id.* § 922(x)(2). Others also may not knowingly transfer such items to them. *Id.* § 922(x)(1). These prohibitions are subject to several exceptions, such as temporary transfers in the course of employment, ranching or farming activities or for target practice, hunting, or a safety course. *Id.* § 922(x)(3).

⁵¹ *Id.* § 922(b)(1). As discussed in more detail *infra*, a federal appellate court recently held that the prohibition on handgun sales to those between the ages of 18 and 20 was unconstitutional under the Second Amendment, *Hirschfeld v. ATF*, 5 F.4th 407, 410 (4th Cir. 2021), *vacated as moot*, No. 19-2250, 2021 WL 4301564, at *2 (4th Cir. Sept. 22, 2021), though that opinion has since been vacated as moot.

⁵² The GCA also imposes a number of limitations on the transfer of firearms even between unlicensed persons, e.g., prohibiting interstate transfers between unlicensed persons in most circumstances. 18 U.S.C. § 922(a)(5).

⁵³ *Id.* §§ 921(a)(9)-(11), 922(a), 923. Manufacturers and importers must likewise obtain a license to engage in the business of importing or manufacturing ammunition. *Id.* § 923(a). The GCA separately provides for the licensing of collectors of “curios or relics,” which are firearms “of special interest to collectors” by reason of age or other unique characteristics. *See* 18 U.S.C. § 921(a)(13); 27 C.F.R. § 478.11. Licensed collectors may engage in interstate transactions involving curios and relics, but they must still become licensed dealers if they wish to be “engaged in the business” of acquiring or selling *any* firearms (including curios and relics). 27 C.F.R. § 478.41(d).

⁵⁴ *See, e.g., Listing of Federal Firearms Licensees (FFLs) - 2017*, ATF, <https://www.atf.gov/firearms/listing-federal-firearms-licensees-ffls-2017> (last reviewed Mar. 3, 2020).

⁵⁵ 18 U.S.C. § 921(a)(21)(A). The term “manufacturer” is also separately defined as a person engaged in the business of manufacturing firearms or ammunition “for purposes of sale or distribution.” *Id.* § 921(a)(10).

⁵⁶ *Id.* § 921(a)(21)(C).

⁵⁷ *Id.* § 921(a)(22).

⁵⁸ *Id.*

⁵⁹ *See, e.g., United States v. Bailey*, 123 F.3d 1381, 1392 (11th Cir. 1997) (“In determining whether one is engaged in the business of dealing in firearms, the finder of fact must examine the intent of the actor and all circumstances surrounding the acts alleged to constitute engaging in business.”) (internal quotation marks and citation omitted).

(4) the defendant's behavior before, during, and after the sales; (5) the type of firearms sold and prices charged; and (6) the defendant's intent at the time of the sales.⁶⁰

Upon licensing, FFLs are subject to recordkeeping⁶¹ and reporting⁶² obligations with respect to the disposition of firearms to non-FFLs and must identify imported or manufactured firearms by means of a serial number,⁶³ among other things. FFLs also must comply with certain other transfer restrictions and, of relevance, background-check requirements. More specifically, the Brady Handgun Violence Prevention Act, signed into law in 1993, requires FFLs to conduct background checks⁶⁴ on most prospective firearm purchasers who are not licensed themselves⁶⁵ in order to ensure that the purchasers are not prohibited from acquiring firearms under federal or state law.⁶⁶ To implement the Brady Act, the FBI created the National Instant Criminal Background Check System (NICS), which launched in 1998.⁶⁷ Today, the NICS background check is completed either by a state "point of contact" (in states that have voluntarily agreed to

⁶⁰ *United States v. Focia*, 869 F.3d 1269, 1280-82 (11th Cir. 2017) (approving jury instructions calling for consideration of "all of the circumstances surrounding the transactions," including several listed factors); *United States v. Tyson*, 653 F.3d 192, 201 (3d Cir. 2011) (noting that "the importance of any one of these considerations is subject to the idiosyncratic nature of the fact pattern presented").

⁶¹ See 18 U.S.C. § 923(g)(1)(A) (requiring maintenance of "such records of importation, production, shipment, receipt, sale, or other disposition of firearms ... as the Attorney General may by regulations prescribe"); 27 C.F.R. § 478.124 (establishing record requirements, which include information on transferee and firearm being transferred).

⁶² See 18 U.S.C. § 923(g)(3)(A) (requiring reporting of multiple sales or dispositions of pistols or revolvers to unlicensed persons); *id.* § 923(g)(5)(A) (requiring submission of record information to Attorney General upon request); *id.* § 923(g)(6) (requiring reporting of theft or loss of firearm from inventory within 48 hours of discovery). Litigants have, at times, objected to government requests for record information on the ground that such requests amount to an end-run around a separate provision of the GCA that prohibits any "rule or regulation" establishing a gun registry, 18 U.S.C. § 926, but such arguments have not had much success. See, e.g., *Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1160 (10th Cir. 2014); *RSM, Inc. v. Buckles*, 254 F.3d 61, 67 (4th Cir. 2001) (acknowledging that ATF may not "issue limitless demand letters ... in a backdoor effort to avoid" the registry prohibition but concluding that "narrowly-tailored" request in context of criminal investigation was permissible).

⁶³ 18 U.S.C. § 923(i).

⁶⁴ As with other areas of firearm regulation, state law can be more restrictive. For example, it appears that more than 20 states and the District of Columbia require background checks for gun sales between private parties. See *Background Checks*, EVERYTOWN FOR GUN SAFETY, https://maps.everytownresearch.org/navigator/states.html?dataset=background_checks (last visited Aug. 17, 2021). Private transfers between unlicensed persons are still subject to other restrictions under federal law as well—for instance, most interstate transfers are prohibited, *id.* § 922(a)(5), and transfer is unlawful if the transferor knows or has reasonable cause to believe that the transferee falls into a category that is legally prohibited from possessing or receiving a firearm. 18 U.S.C. § 922(d).

⁶⁵ Background checks are not required for transfers between FFLs, transfers in cases where the transferee holds a permit issued within the past five years in a state that requires a government official to complete a background check, transfers subject to more-stringent NFA requirements, or transfers for which the Attorney General has certified that a background check would be impracticable for specified reasons. 18 U.S.C. § 922(t)(1), (3).

⁶⁶ *Id.* § 922(t). Exceptions exist to the background check requirement. For example, background checks are not required for prospective purchasers who hold valid permits in certain states that already provide for their own background checks. See *id.* § 922(t)(3)(A). Despite such exceptions, an FFL that knowingly fails to conduct a background check when one is required, and when the check would bar a sale, may have its license suspended or revoked and be subject to a civil or criminal fine and/or up to one year in prison. *Id.* § 922(t)(5). Fines of up to \$10,000 may also be levied on FFLs, state or local agencies, or individuals for misusing the NICS system. See 28 C.F.R. § 25.11.

⁶⁷ See *National Instant Criminal Background Check System (NICS)*, FBI, <https://www.fbi.gov/services/cjis/nics> (last visited Aug. 17, 2021). Between the enactment of the Brady Act and the launch of NICS, a set of interim provisions required background checks to be conducted through "the chief law enforcement officer of the place of residence of the transferee," 18 U.S.C. § 922(s), but the Supreme Court struck down those provisions as an unconstitutional usurpation of state executive prerogatives. *Printz v. United States*, 521 U.S. 898, 935 (1997).

provide that service) or by the FBI.⁶⁸ Background checks in point-of-contact states may be more accurate, as such states access the NICS databases and can also access state databases that may contain more prohibiting records.⁶⁹

Through NICS, FFLs can determine whether a prospective firearm purchaser is disqualified from receiving a firearm.⁷⁰ Generally, the NICS check will quickly tell the dealer whether the sale may or may not proceed, or if it must be delayed for further investigation.⁷¹ If a dealer receives a response that the sale must be delayed, and the NICS check does not further alert the dealer as to whether the prospective purchaser is disqualified within three business days, the sale may proceed at the dealer's discretion.⁷² This scenario is sometimes referred to as a "default proceed."⁷³ Regardless of whether, or when, an FFL receives a response from NICS, the purchaser and FFL must complete an ATF Form 4473 to consummate an ordinary firearm transaction, which requires (among other things) a signed attestation on the part of the purchaser that he or she is the actual purchaser and does not fall into any of the categories legally prohibited from possessing or receiving a firearm.⁷⁴ Knowingly making a false statement in this respect is a violation of federal law.⁷⁵ An attestation on the ATF Form 4473 that the purchaser is not a prohibited person, when a background check reveals otherwise, may provide evidence of such a violation, though it appears that prosecutions for lying on the ATF form are relatively few.⁷⁶ The investigation may continue for a period of time after the three business days, and if an FFL receives a "denied" response after the third business day and after the firearm has already been transferred, the FFL "should notify" the NICS Section of the FBI that the transfer was completed.⁷⁷

⁶⁸ See *About NICS*, FBI, <https://www.fbi.gov/services/cjis/nics/about-nics> (last visited Aug. 17, 2021). Some states opt to conduct the background check for only some (e.g., handguns) FFL firearms transfers. *Id.*

⁶⁹ See 28 C.F.R. § 25.6(e) (recognizing that points of contact may "also conduct a search of available files in state and local law enforcement and other relevant record systems").

⁷⁰ See *About NICS*, FBI, <https://www.fbi.gov/services/cjis/nics/about-nics> (last visited Aug. 17, 2021). Because the databases used by NICS rely on record submissions from multiple federal entities and voluntary submissions from states, they are not comprehensive. Congress has sought on multiple occasions to improve the processes by which records are collected and to make the databases more comprehensive, mainly through mandates for federal departments and agencies and monetary incentives/penalties for states tied to submitting records to NICS. See NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 122 Stat. 2559 (2008); Fix NICS Act of 2018, Pub. L. No. 115-141, tit. VI, 132 Stat. 348 (2018).

⁷¹ 28 C.F.R. § 25.6 (indicating that point of contact will generally notify FFL that transfer may proceed, is delayed pending further record analysis, or is denied).

⁷² 18 U.S.C. § 922(t)(1)(B)(ii). Some state laws may provide for more time to complete background checks than the three days given under federal law, and FFLs must comply with the longer limits. *Does a licensee conducting a NICS check have to comply with state waiting periods before transferring a firearm?*, ATF, <https://www.atf.gov/firearms/qa/does-licensee-who-conducts-nics-check-have-comply-state-waiting-periods-transferring> (last reviewed May 22, 2020).

⁷³ E.g., *Default Proceeds Replaced by Default Infringement*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (Mar. 8, 2019), <https://www.nraila.org/articles/20190308/default-proceeds-replaced-by-default-infringement>.

⁷⁴ See *Firearms Transaction Record (Form 4473)*, ATF, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download> (revised May 2020).

⁷⁵ 18 U.S.C. § 922(a)(6).

⁷⁶ See *Law Enforcement: Few Individuals Denied Firearms Purchases are Prosecuted and ATF Should Assess Use of Warning Notices in Lieu of Prosecutions*, GAO (Sept. 5, 2018), <https://www.gao.gov/products/gao-18-440> (concluding that federal and selected state law enforcement agencies "collectively investigate and prosecute a small percentage of individuals who falsify information on a firearms form (e.g., do not disclose a felony conviction) and are denied a purchase").

⁷⁷ See *What if a licensee receives a "denied" response from NICS or a state POC after 3 business days have elapsed, but prior to the transfer of the firearm?*, ATF, <https://www.atf.gov/firearms/qa/what-should-licensee-do-if-he-or-she>

Recent Developments

The federal firearms laws described above have been subject to ongoing consideration by decision makers in the executive, legislative, and judicial branches—for instance, ATF is charged with interpreting federal requirements for firearms and determining whether and when particular kinds of firearms or components (such as bump stocks) are subject to restrictions imposed by the NFA and GCA.⁷⁸ For its part, Congress has regularly considered proposals to modify the current federal framework for regulating firearms.⁷⁹ Federal courts have also continued to address constitutional challenges to particular firearms measures under the Second Amendment, informing the scope of permissible legislative and regulatory action in the process.⁸⁰ Recent developments in all three of these arenas could impact existing legal requirements under the NFA and GCA in several ways, from expanding background check requirements to limiting the use of certain firearm attachments.

Executive Branch

On April 7, 2021, President Biden announced six executive actions seeking to address gun violence.⁸¹ Among those actions were instructions for DOJ to issue rules addressing (1) so-called “ghost guns” lacking serial numbers or other identifying markings, and (2) the extent to which handguns with certain stabilizing or arm braces are considered “short-barreled rifles” under the NFA.⁸² DOJ was also instructed to “publish model ‘red flag’ legislation” establishing mechanisms for temporary, court-ordered removal of firearms from persons that pose a risk of committing gun violence.⁸³ In late May and early June 2021, ATF published proposed rules addressing certain regulatory definitions relevant to identification requirements for firearms⁸⁴ and criteria for legally categorizing firearms with attached stabilizing braces.⁸⁵ DOJ also issued the requisite model “red flag” or “extreme risk protection order” legislation, along with commentary.⁸⁶ This report provides context for each action and an overview of the proposed rules and model legislation issued by ATF.

gets-%E2%80%9Cdenied%E2%80%9D-response-nics-or-state-point-contact (last reviewed Mar. 24, 2021).

⁷⁸ See, e.g., Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (amending regulatory definition of *machinegun*, for purposes of the NFA and GCA, to include bump-stock-type devices, i.e., devices that “allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger”). As noted previously, this regulatory action is the subject of ongoing court challenges. See *supra* note 25.

⁷⁹ For examples from the 116th Congress, see CRS Report R45629, *Federal Firearms Laws: Overview and Selected Legal Issues for the 116th Congress*, by Michael A. Foster.

⁸⁰ E.g., *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc), *petition for cert. docketed*, No. 20-1639 (U.S. May 25, 2021).

⁸¹ See *Fact Sheet: Initial Actions*, *supra* note 8. As noted previously, the Administration and ATF have announced other strategies to combat gun violence as well, relating to things like cross-jurisdictional enforcement efforts and priorities in enforcing existing law. See *supra* note 8.

⁸² *Fact Sheet: Initial Actions*, *supra* note 8.

⁸³ *Id.*

⁸⁴ Definition of “Frame or Receiver” and Identification of Firearms, 86 Fed. Reg. 27,720 (proposed May 21, 2021).

⁸⁵ Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. 30,826 (proposed June 10, 2021).

⁸⁶ *Commentary for Extreme Risk Protection Order Model Legislation*, DOJ (June 7, 2021), <https://www.justice.gov/doj/reducing-gun-violence/commentary-extreme-risk-protection-order-model-legislation#model>.

Unmarked or “Ghost” Guns

FFLs are required to “identify by means of a serial number engraved or cast on the receiver or frame of the weapon” each firearm manufactured.⁸⁷ Existing regulations establish more detailed requirements for how the serial number must be affixed, down to minimum depth and print size, and require additional information such as the firearm model, caliber or gauge, and the FFL’s name and city and state of business.⁸⁸ These identification requirements extend to firearm “frames or receivers” even if they are not component parts of complete weapons at the time they are sold,⁸⁹ as “frames or receivers” are considered “firearms” for purposes of the GCA.⁹⁰ The term “frame or receiver” is separately defined in regulations as “[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.”⁹¹ As described by ATF, a “frame or receiver” is essentially “the primary structural component of a firearm to which fire control components are attached.”⁹² The firearm identification requirements in statute and regulation facilitate ATF’s ability to trace firearms that are lost or used in crimes, as the chain of custody and distribution may be established using FFL’s required records.⁹³

Not all firearms in the United States are subject to the identification requirements described above. First, the requirements apply only to FFLs, meaning that individuals who wish to make their own firearms for personal use need not identify or mark them.⁹⁴ The process of making one’s own firearm, not subject to identification requirements, has also been facilitated in recent years by 3D-printing technology⁹⁵ and the availability of “kits” comprised of firearm components with *unfinished* frames or receivers that can be completed and assembled at home by the purchaser. ATF currently does not consider certain receiver “blanks,” “castings,” or “machined bodies”—i.e., so-called “unfinished” or “80%” receivers that require an additional amount of machining—to be “frames or receivers” subject to GCA requirements, as the items “have not reached the ‘stage of manufacture’ which would result in the classification of a firearm according to” federal law.⁹⁶ Accordingly, such components can be sold commercially, individually or in kits

⁸⁷ 18 U.S.C. § 923(i).

⁸⁸ 27 C.F.R. § 478.92(a)(1). Alternative means of identification may be authorized if shown to be “reasonable” and not a hindrance to effective administration of firearms regulations. *Id.* § 478.92(a)(4)(i).

⁸⁹ *Id.* § 478.92(a)(2). Parts defined as machine guns, firearm mufflers, and firearm silencers must be identified in the same manner unless other means are authorized by ATF. *Id.* § 478.92(a)(4)(iii).

⁹⁰ 18 U.S.C. § 921(a)(3).

⁹¹ 27 C.F.R. § 479.11; *see id.* § 478.11 (defining term “firearm frame or receiver” effectively identically).

⁹² Definition of “Frame or Receiver” and Identification of Firearms, 86 Fed. Reg. 27,720, 27,720 (proposed May 21, 2021).

⁹³ *See The Tracing Process*, ATF, <https://www.atf.gov/firearms/national-tracing-center> (last reviewed June 15, 2020); 18 U.S.C. § 923(g)(1)(A) (establishing recordkeeping requirements); 27 C.F.R. § 478.123 (providing more detailed requirements for records maintained by licensed manufacturers).

⁹⁴ *See Does an individual need a license to make a firearm for personal use?*, ATF, <https://www.atf.gov/firearms/qa/does-individual-need-license-make-firearm-personal-use> (last reviewed Mar. 17, 2020). Certain kinds of firearms manufactured for personal use are still subject to the more stringent requirements of the NFA. *See supra* notes 19-35 and accompanying text.

⁹⁵ *See* CRS Report R45852, *3D Printing: Overview, Impacts, and the Federal Role*, by John F. Sargent Jr. and R.X. Schwartz (detailing expanded availability of 3D-printing technology). Firearms with non-metal components that are 3D-printed may be subject to the Undetectable Firearms Act’s prohibition on the manufacture, importation, possession, transfer, or receipt of firearms that are undetectable by x-ray machines or metal detectors at security checkpoints. *See* Pub. L. No. 100-649, 102 Stat. 3816 (1988) (codified at 18 U.S.C. § 922(p)).

⁹⁶ *See Are “80%” or “unfinished” receivers illegal?*, ATF, <https://www.atf.gov/firearms/qa/are-e2%80%9C80%E2%80%9D-or-e2%80%9Cunfinished-e2%80%9D-receivers-illegal> (last reviewed Apr. 6,

with other components necessary to build operable firearms, without the need to conduct a background check on the purchaser through NICS or mark the items being sold with identifying information.⁹⁷

Additionally, ATF's current definitions of "frame or receiver" arguably do not cover some kinds of modern firearms. Specifically, ATF's definitions of "frame or receiver" "do not expressly capture" many types of firearms that have receivers in multiple pieces, for instance, or that otherwise do not incorporate all of the components in the definitional language.⁹⁸ According to ATF, such firearms now "constitute the majority of firearms in the United States."⁹⁹ Thus, if read strictly, as some courts have done,¹⁰⁰ the current definitional language could mean, in ATF's view, that many firearms have no frame or receiver subject to regulation, and manufacturers of split or multi-piece receivers would not need to comply with marking, background check, licensing, and recordkeeping requirements, among other things.¹⁰¹

Completed firearms that are unmarked and thus more difficult to identify are sometimes referred to as "ghost guns."¹⁰² They may later be resold, entering the stream of commerce without markings useful in tracing them should they be used illicitly.¹⁰³ Some have also expressed concern that the commercial availability of kits with unmarked firearm components that may be completed and assembled by the purchaser could facilitate access to firearms by those who are prohibited from possessing them, given that such items can be sold without a background check.¹⁰⁴ Conversely, at least one commentator has suggested that the importance of serial

2020). Although the term "80% receiver" that is sometimes used may suggest a bright-line rule, whether a receiver blank meets the definition of a "firearm" for GCA purposes is a case-by-case determination that does not depend on whether a blank is precisely 80% complete. See *What is an "80%" or "unfinished" receiver?*, ATF, <https://www.atf.gov/firearms/qa/what-%E2%80%9C80%E2%80%9Dor-%E2%80%9Cunfinished-receiver> (last reviewed Feb. 6, 2020) (stating that ATF "does not use or endorse" the 80% term); See *Are some items being marketed as non-firearm "unfinished" or "80%" receivers actually considered firearms?*, ATF, <https://www.atf.gov/firearms/qa/are-some-items-being-marketed-non-firearm-unfinished-or-80-receivers-actually-considered> (last reviewed June 24, 2020) (reflecting that some items being marketed as 80% receivers "do actually meet the definition of a 'firearm'" under the GCA).

⁹⁷ Amy Swearer, *Breaking Down Biden's Proposed "Ghost Gun" Rules*, HERITAGE FOUND. (May 27, 2021), <https://www.heritage.org/firearms/commentary/breaking-down-bidens-proposed-ghost-gun-rules> (noting that "some manufacturers now sell 'gun kits'" with partially finished receivers and other components, none of which "technically comprises a firearm—or a frame or receiver—at the time the kit is sold").

⁹⁸ Definition of "Frame or Receiver" and Identification of Firearms, 86 Fed. Reg. 27,720, 27,721 (proposed May 21, 2021).

⁹⁹ *Id.*

¹⁰⁰ See *United States v. Jimenez*, 191 F. Supp. 3d 1038, 1041 (N.D. Cal. 2016) ("[T]he lower receiver for which [the defendant] was arrested and indicted houses only two of the required features—the hammer and the firing mechanism.").

¹⁰¹ 86 Fed. Reg. at 27,722.

¹⁰² E.g., Richard Winton, *L.A. Gangs Stockpile Untraceable "Ghost Guns" that Members Make Themselves*, L.A. TIMES (July 6, 2018), <https://www.latimes.com/local/lanow/la-me-la-gangsters-homemade-guns-20180706-story.html>; Press Release, Dep't of Just., Rhode Island Man Charged with Building, Selling "Ghost" Machine Gun (Dec. 12, 2018), <https://www.atf.gov/news/pr/rhode-island-man-charged-building-selling-ghost-machine-gun>.

¹⁰³ *Can functioning firearms made from receiver blanks be traced?*, ATF, <https://www.atf.gov/firearms/qa/can-functioning-firearms-made-receiver-blanks-be-traced> (last reviewed Feb. 6, 2020) ("Because receiver blanks do not have markings or serial numbers, when firearms made from such receiver blanks are found at a crime scene, it is usually not possible to trace the firearm or determine its history, which hinders crime gun investigations and jeopardizes public safety.").

¹⁰⁴ E.g., Rebecca Beitsch, *DOJ Proposes Crackdown on "Ghost Guns" Following Biden Pledge*, THE HILL (May 7, 2021), <https://thehill.com/policy/national-security/552405-doj-proposes-crackdown-on-ghost-guns-following-biden-pledge-on-gun>; Glenn Thrush, *San Francisco Sues Three Online Retailers for Selling "Ghost Guns,"* N.Y. TIMES (Aug.

numbers in firearm tracing is overstated and that private assembly of firearms for personal use has a long history, mainly among “hobbyists, enthusiasts, and people who enjoy tinkering.”¹⁰⁵

The President’s April 7, 2021, announcement of actions to address gun violence included an order for DOJ, within 30 days, to “issue a proposed rule to help stop the proliferation of ‘ghost guns.’”¹⁰⁶ The proposed rule, issued in early May of 2021, would make a number of changes to current regulatory definitions and requirements relevant to homemade and unmarked firearms.¹⁰⁷ As a preliminary matter, the proposed rule would amend ATF’s regulatory definitions of “frame or receiver” to account for developments in firearms technology as described above. The proposed rule would update the regulatory definitions to include any externally visible housing or holding structure for one or more “fire control components,”¹⁰⁸ and would further define a “fire control component” as “a component necessary for the firearm to initiate, complete, or continue the firing sequence,”¹⁰⁹ with listed examples. For firearms with multiple such parts, the proposed rule would allow the ATF director to determine which part or parts are frames or receivers, taking into consideration a number of factors such as the intent of the manufacturer and design features.¹¹⁰ Under the proposed rule, any firearm part falling within this definition would have to be identified with a serial number and would be presumed to be a frame or receiver.¹¹¹

With respect to firearm component kits and unfinished frames or receivers, the proposed rule would first include in the regulatory definition of “firearm” a “weapon parts kit that is designed to or may readily be assembled, completed, converted, or restored to expel a projectile by the action of an explosive.”¹¹² According to ATF, this amendment would make clear that weapon parts kits can be “firearms” within the meaning of the GCA, as the statutory definition extends beyond

18, 2021), <https://www.nytimes.com/2021/08/18/us/sf-ghost-guns.html>.

¹⁰⁵ *Stop Gun Violence: Ghost Guns: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 117th Cong. 12 (2021) (written testimony of Ashley Hlebinsky, Curator Emerita & Senior Firearms Scholar, Cody Firearms Museum), <https://www.judiciary.senate.gov/imo/media/doc/Ashley%20Hlebinsky%20Written%20Testimony%20Final.pdf>. Some state and local laws may further restrict the making or possession of ghost guns, and litigation concerning the permissibility of some restrictions, as well as the propriety of continued marketing of the weapons in jurisdictions where they are restricted, is ongoing. See Martin Austermuhle, *In New Lawsuit, D.C. Gun Advocates Take Aim at Restrictions on ‘Ghost Guns,’* NPR (Sept. 10, 2021), <https://www.npr.org/local/305/2021/09/10/1035881089/in-new-lawsuit-d-c-gun-advocates-take-aim-at-restrictions-on-ghost-guns>; *San Francisco DA Sues 3 California-Based ‘Ghost Gun’ Makers*, AP NEWS (Aug. 18, 2021), <https://apnews.com/article/business-california-gun-politics-san-francisco-police-reform-4247bd94aacc148e07b3a228d1d47bbf>.

¹⁰⁶ *Fact Sheet: Initial Actions*, *supra* note 8.

¹⁰⁷ Definition of “Frame or Receiver” and Identification of Firearms, 86 Fed. Reg. 27,720 (proposed May 21, 2021). Although this report’s discussion of legislative developments, *infra*, is limited to firearms legislation that has passed the House of Representatives, at least one bill introduced in the 117th Congress would also address ghost guns by amending the definition of “firearm” in the GCA. See Ghost Guns are Guns Act, H.R. 1454, 117th Cong. (2021).

¹⁰⁸ 86 Fed. Reg. at 27,741.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 27,743.

¹¹¹ The proposed rule would also maintain the other marking requirements described previously, though FFLs would now have the option to mark new designs or configurations with either their name and city and state of business or their name and abbreviated FFL number along with the serial number on each part defined as a frame or receiver. *Id.* at 27,747. The proposed rule would also establish that destroyed frames or receivers do not meet the definition. *Id.* at 27,746. Licensed manufacturers would be required to comply with the marking/identification requirements “no later than seven days following the date of completion of the active manufacturing process” or “prior to disposition, whichever is sooner.” *Id.* at 27,747. Privately made firearms that come into an FFL’s possession would be subject to additional marking requirements, described *infra*.

¹¹² *Id.* at 27,741.

weapons that expel a projectile by the action of an explosive and includes weapons “designed” or that “may readily be converted” to do so.¹¹³ Underscoring this understanding, and to address kits with so-called “unfinished” or “80%” receivers, the proposed rule would also include in the regulatory definitions of “frame or receiver” any “partially complete, disassembled, or inoperable” frame or receiver “that has reached a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state.”¹¹⁴ The term “partially complete,” in turn, would be defined as “a forging, casting, printing, extrusion, machined body, or similar article that has reached a stage in manufacture where it is clearly identifiable as an unfinished component part of a weapon.”¹¹⁵ Additionally, the term “readily” would be defined as “a process that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process.”¹¹⁶ A lengthy list of factors would be relevant to this determination, including ease, expertise required, tools required, and length of time required to finish the process.¹¹⁷ In short, it appears that the new regulatory language and definitions would seek to include as “firearms,” subject to GCA requirements, the kinds of unfinished receivers that have been available commercially for home completion without marking or background checks.

The proposed rule would add other requirements to facilitate the identification and tracing of unmarked firearms that come into an FFL’s inventory. As noted previously, FFLs are currently required to comply with recordkeeping requirements related to their business, including maintaining records reflecting certain information about the firearms in inventory and that are subsequently received or disposed of (e.g., model and serial number),¹¹⁸ and completing records of firearm transactions with unlicensed persons.¹¹⁹ The proposed rule would seek to supplement those requirements in the case of unmarked firearms and establish express requirements for marking such firearms when received by an FFL. First, the proposed rule would require FFLs to mark, or supervise the marking of, the frame or receiver of each “privately made firearm” that the FFL acquires within seven days of acquisition or prior to further transfer, whichever is sooner.¹²⁰ The term “privately made firearm” would be defined as a “firearm, including a frame or receiver, assembled or otherwise produced by a person other than a licensed manufacturer, and without a serial number or other identifying markings placed by a licensed manufacturer at the time the firearm was produced.”¹²¹ To facilitate access to marking, the proposed rule would make amendments to certain regulatory terms to permit gunsmiths to become licensed solely to provide professional marking services for privately made firearms.¹²² Finally, the proposed rule would make amendments to the regulations regarding FFL recordkeeping in order to clarify when and how, among other things, privately made firearms received in an FFL’s inventory are to be

¹¹³ *Id.* at 27,726.

¹¹⁴ *Id.* at 27,746. Separately, the proposed rule would make a number of amendments to definitions related to firearm mufflers and silencers in order to clarify when a muffler or silencer part is considered a “frame or receiver” that must be marked, among other things. *See id.* at 27,728 (describing amendments).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 27,747.

¹¹⁷ *Id.*

¹¹⁸ 18 U.S.C. § 923(g)(1)(A); 27 C.F.R. § 478.125.

¹¹⁹ 27 C.F.R. § 478.124.

¹²⁰ 86 Fed. Reg. at 27,747. A longer length of time would be given to mark privately made firearms acquired before the effective date of the rule. *Id.* at 27,748.

¹²¹ *Id.* at 27,746-47. The definition would not include identified and registered NFA firearms or those made before October 22, 1968 (subject to other identification requirements). *Id.* at 27,747.

¹²² *Id.* at 27,741

recorded¹²³ and to require maintenance of FFL records indefinitely for tracing purposes (rather than the previously required twenty years).¹²⁴

Overall, it appears that the proposed rule would limit the production and acquisition of unmarked firearms by reducing the current commercial availability of items or kits not subject to identification and background check requirements. Additionally, the rule would establish clear obligations for the marking of, and recordkeeping regarding, privately made firearms by FFLs in order to facilitate tracing when unmarked firearms pass through an FFL's inventory and are subsequently tied to criminal conduct. The proposed rule would not, however, require private, unlicensed persons to mark or otherwise comply with new requirements regarding firearms they make at home for personal use. To the extent such firearms must be marked and recorded under the proposed rule, the onus would fall on FFLs who manufacture incomplete frames or receivers for home assembly or who receive unmarked firearms in their inventories.

In accordance with the Administrative Procedure Act, ATF provided the public until August 19, 2021, to comment on the proposed rule through the submission of "data, views, or arguments."¹²⁵ ATF will consider the comments and, should it move forward with a final rule, must respond to any "significant" comments received before the rule becomes effective.¹²⁶

Handguns with Stabilizing or Arm Braces

The NFA covers short-barreled rifles, which are defined in part as weapons "designed or redesigned, made or remade, and intended to be fired from the shoulder" and having a barrel length of less than 16 inches.¹²⁷ If a firearm falls into this definitional category, it is subject to taxation, identification, and registration requirements under the NFA¹²⁸ and specific restrictions under the GCA on transportation and sale by FFLs¹²⁹ that go beyond baseline GCA requirements applicable to most other kinds of firearms.

Some larger handguns come with, or can be equipped with, stabilizing or arm braces that may be attached to the firearm's rearward portion to facilitate one-handed firing for the disabled, among other purposes.¹³⁰ Whether certain handguns equipped with stabilizing braces meet the statutory definitions of short-barreled rifles such that they are subject to the additional restrictions

¹²³ *Id.* at 27,749-51.

¹²⁴ *Id.* at 27,750-51. The proposed rule would make a number of other regulatory changes, many conforming or related to issues such as, for example, marking of armor piercing ammunition and voluntary ATF classification requests, which are not further discussed in this report.

¹²⁵ 5 U.S.C. § 553(c); see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey.

¹²⁶ *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."); see 5 U.S.C. § 553(d) (requiring publication or service of rule in most cases not less than 30 days before effective date).

¹²⁷ 26 U.S.C. § 5845. The GCA provides functionally identical relevant definitions for its provisions applicable to short-barreled rifles. 18 U.S.C. § 921(a)(7)-(8).

¹²⁸ See *supra* "National Firearms Act of 1934."

¹²⁹ See 18 U.S.C. § 922(a)(4) (prohibiting non-FFLs from transporting short-barreled rifles, among other firearms, in interstate or foreign commerce "except as specifically authorized by the Attorney General consistent with public safety and necessity"); *id.* § 922(b)(4) (prohibiting FFLs from selling or delivering short-barreled rifles, among other firearms, "except as specifically authorized by the Attorney General consistent with public safety and necessity").

¹³⁰ See Letter from Rep. Richard Hudson et al., to Hon. William Barr, Att'y Gen., DOJ, and Hon. Regina Lombardo, Acting Dir., ATF (Dec. 22, 2020), <https://d3uwh8jpzww49g.cloudfront.net/sharedmedia/1511337/hudson-and-members-letter-to-doj-and-atf-re-stabilizing-braces.pdf> (referencing needs of disabled combat veterans who enjoy recreational shooting as a "legitimate use[] for certain 'stabilizing braces'").

described above has been something of a legal gray area. Arguably, most kinds of handguns are not designed, made, or intended to be “fired from the shoulder” and so do not meet the statutory definitions of a “rifle.”¹³¹ If used with certain braces, however, they may be fired from the shoulder, depending on the nature of the firearm, the brace, and how they are used together. For example, in a 2017 letter to a stabilizing brace manufacturer regarding regulation of their products, ATF noted that a pistol with a barrel shorter than 16 inches and an attached *shoulder stock* is an NFA firearm, but attaching a stabilizing brace to a handgun and using it as an *arm brace* does not make the firearm into a short-barreled rifle subject to further restrictions under the NFA.¹³² With respect to the question of what constitutes a shoulder stock, ATF stated that “an item that functions as a [shoulder] stock if attached to a handgun in a manner that serves the objective purposes of allowing the firearm to be fired from the shoulder may result in ‘making’ a short-barreled rifle, even if the attachment is not permanent.”¹³³ ATF further clarified that “[t]he fact that the item may allow, or even be intended by its manufacturer for other lawful purposes, does not affect the NFA analysis.”¹³⁴ In other words, some products, even if referred to and marketed as arm or stabilizing braces, could be considered shoulder stocks if configured to permit firing from the shoulder, such that their attachment to a handgun would result in a short-barreled rifle subject to the additional legal requirements described above.

On December 18, 2020, ATF issued a notice and request for comments with proposed guidance regarding what “objective design features” ATF would consider in determining whether a weapon with an attached stabilizing brace has been “designed or redesigned, made or remade, and intended to be fired from the shoulder” and thus potentially a short-barreled rifle.¹³⁵ The guidance indicated that certain features of the firearm (such as type, caliber, and weight) and of the stabilizing brace being used (such as attachment method and comparative function as stabilizing brace versus shouldering device), among other things, would be assessed on a case-by-case basis.¹³⁶ On December 23, 2020, the notice was withdrawn pending further DOJ review.¹³⁷

The issue came under renewed scrutiny a few months later when a man allegedly used a Ruger AR-556 pistol with a brace to kill ten people in a Colorado grocery store.¹³⁸ Shortly after the shooting, President Biden ordered DOJ to issue “a proposed rule to make clear when a device marketed as a stabilizing brace effectively turns a pistol into a short-barreled rifle subject to the

¹³¹ See 18 U.S.C. § 921(a)(29) (defining “handgun,” in part, as a firearm with a short stock that “is designed to be held and fired by the use of a single hand”). *Smoothbore* handguns that are capable of being concealed on the person or that can fire a fixed shotgun shell are NFA regulated under the separate category of “any other weapon.” 26 U.S.C. § 5845(e). The handguns described in this report are those that would not be regulated under the “any other weapon” category of the NFA. See CRS In Focus IF11763, *Handguns, Stabilizing Braces, and Related Components*, by William J. Krouse (describing distinction between rifled bore handguns and smoothbore handguns for NFA purposes).

¹³² Letter from Marvin G. Richardson, Assistant Dir. of Enft Programs & Servs., ATF, to Mark Barnes, Esq., Outside Counsel to SB Tactical, LLC 1-2 (Mar. 21, 2017), <https://johnpierceesq.com/wp-content/uploads/2017/03/ATF-Letter-March-21-2017.pdf>.

¹³³ *Id.* at 3.

¹³⁴ *Id.*

¹³⁵ Objective Factors for Classifying Weapons with “Stabilizing Braces,” 85 Fed. Reg. 82,516 (proposed Dec. 18, 2020).

¹³⁶ *Id.* at 82,518.

¹³⁷ Objective Factors for Classifying Weapons with “Stabilizing Braces”; Withdrawal of Guidance, 85 Fed. Reg. 86,948 (withdrawn Dec. 31, 2020).

¹³⁸ Melissa Macaya, et al., *10 Killed in Colorado Grocery Store Shooting*, CNN (Mar. 23, 2021), https://www.cnn.com/us/live-news/boulder-colorado-shooting-3-23-21/h_0c662370eefaeff05eac3ef8d5f29e94.

requirements of the National Firearms Act.”¹³⁹ ATF published its proposed rule on the subject on June 10, 2021.¹⁴⁰ The proposed rule would make the relatively simple change of amending the regulatory definitions of “rifle” to include “any weapon with a rifled barrel equipped with an accessory or component purported to assist the shooter to stabilize the weapon while shooting with one hand, commonly referred to as a ‘stabilizing brace,’ that has objective design features and characteristics that facilitate shoulder fire.”¹⁴¹ A key component of the proposed rule would be the issuance and use of a new “ATF Worksheet 4999” that individuals could use “to evaluate whether a weapon incorporating a ‘stabilizing brace’ . . . [would] be considered” a covered rifle, and which ATF would use to evaluate and classify the same.¹⁴² Broadly, the worksheet sets out a list of factors that are given point values and divided into three sections: (1) prerequisites, (2) accessory characteristics, and (3) configuration of weapon.¹⁴³ A submitted firearm sample would have to meet the listed prerequisites in section one to qualify as a possible pistol suitable for a brace; if meeting the prerequisites, an accumulation of less than four points in sections two and three would result in a determination that the firearm is not designed to be fired from the shoulder absent evidence that the manufacturer intended such functionality.¹⁴⁴ Conversely, accumulating four or more points in either section two or three would result in a determination that the firearm is designed and intended to be fired from the shoulder.¹⁴⁵

As the proposed rule indicates, many of ATF’s rulings regarding individual braces and configurations of braces and firearms have not been made widely available;¹⁴⁶ thus, it is difficult to assess in the abstract the extent to which the proposed rule and worksheet criteria would bring individual handguns with stabilizing braces under the umbrella of the “short-barreled rifle” designation. That said, the proposed rule acknowledges that some manufacturers may have previously received classifications for braces without attached firearms or “may have received a classification for a firearm that would be considered a NFA firearm under these criteria” and encourages resubmission of those items for review and classification under the new criteria.¹⁴⁷ As such, it appears that the criteria in the proposed rule have the potential to bring within the purview of NFA regulation and additional GCA regulation certain firearms with braces that were not previously subject to those requirements. The proposed rule provides several options for affected persons, including coming into compliance with NFA requirements, removing or altering the brace, destroying the firearm, or turning it in to a local ATF office, among other things.¹⁴⁸

As with the proposed rule regarding unmarked firearms, the public was given the opportunity to submit comments on the proposed rule addressing firearms with stabilizing braces, which ATF

¹³⁹ *Fact Sheet: Initial Actions*, *supra* note 8.

¹⁴⁰ Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. 30,826 (proposed June 10, 2021).

¹⁴¹ *Id.* at 30,850.

¹⁴² *Id.* at 30,828. If determined to be a rifle, having an attached barrel of less than 16 inches would result in classification as a “short-barreled rifle” subject to the NFA and other requirements described previously. *Id.* at 30,829.

¹⁴³ *Id.* at 30,830-31.

¹⁴⁴ *Id.* at 30,829. Even if accruing less than four points in each section, evidence of intent to “advertise, sell, or otherwise distribute” handguns with stabilizing braces as short-barreled rifles may result in classification as a rifle regardless of the proposed worksheet, “because there is no longer any question that the intent is for the weapon to be fired from the shoulder.” *Id.* at 30,834.

¹⁴⁵ *Id.* at 30,829.

¹⁴⁶ *Id.* at 30,828.

¹⁴⁷ *Id.* at 30,829.

¹⁴⁸ *Id.* at 30,843-44.

will consider in promulgating its final rule.¹⁴⁹ The comment period closed on September 8, 2021.¹⁵⁰

Model “Red Flag” or Extreme Risk Protection Order Law

In recent years, at least nineteen states and the District of Columbia have passed laws permitting courts to issue temporary orders barring particular persons from possessing guns and/or authorizing law enforcement to seize their guns based on some showing of imminent danger to themselves or others.¹⁵¹ These so-called “red flag” or “extreme risk protection order” (ERPO) laws generally provide procedures for certain persons to petition a court to order that firearms be temporarily taken or kept away from someone who poses a risk of committing gun violence.¹⁵² Proponents of such laws assert that they establish a constitutionally permissible mechanism to potentially save lives by removing firearms from persons shown to be a risk to themselves or others, while opponents have questioned their efficacy and whether certain aspects of proposed ERPO laws may raise constitutional concerns if legislation is not sufficiently tailored.¹⁵³ Current state laws providing for the issuance of ERPOs vary in the details, but common elements include the following:

1. Only specific categories of persons may petition a court for an order. Law enforcement officers are invariably included, but authorization may extend as well to family or household members, certain employers or coworkers, or certain health care providers, among others.¹⁵⁴
2. Preliminary orders of brief duration may be available *ex parte*, i.e., without notice to or appearance by the person who is the subject of the order. After the person who is alleged to pose a risk of gun violence has been given notice and an opportunity to appear, a final order of longer duration may be entered. Final orders can last up to one year under many state provisions, with the opportunity for renewal.¹⁵⁵
3. For either a preliminary or final order to be issued, some factual showing must be made that the person for whom the order is sought poses a risk of using a firearm to harm themselves or others, with the stringency of the requisite showing depending on whether an *ex parte* or final order is requested. The standard, and the standard of proof, vary by state. For *ex parte* orders, the standard is typically framed as reasonable or probable cause to believe the person poses an imminent risk, significant danger, or some variation. For final orders, a preponderance of the evidence, or the more stringent standard of clear and convincing evidence, of

¹⁴⁹ *Id.* at 30,850.

¹⁵⁰ *Id.* at 30,826.

¹⁵¹ Robyn Thomas, *Five Myths About Red-Flag Gun Laws*, WASH. POST (Apr. 23, 2021), https://www.washingtonpost.com/outlook/five-myths/five-myths-red-flag-laws/2021/04/22/a4842bc8-a37f-11eb-a7ee-949c574a09ac_story.html.

¹⁵² *Id.*

¹⁵³ *See id.* For an overview of certain constitutional issues related to extreme risk protection order laws, see CRS In Focus IF11205, *Firearm “Red Flag” Laws in the 116th Congress*, by Michael A. Foster.

¹⁵⁴ *E.g.*, N.M. STAT. ANN. § 40-17-5 (limiting to law enforcement, or district attorney or attorney general in some cases); OR. REV. STAT. ANN. § 166.527 (extending to family or household members).

¹⁵⁵ *E.g.*, FLA. STAT. § 790.401 (reflecting these components, including one-year limit and renewal).

a significant danger, extreme risk, or an alternative formulation is often required.¹⁵⁶

4. Upon entry and service of an order, the person who is the subject of the order must relinquish his or her firearms (if he or she possesses any) immediately or within a certain amount of time. In some states, a warrant will or can also be issued authorizing search and seizure by law enforcement.¹⁵⁷

As part of the President's April 7, 2021, announcement of actions to address gun violence, he "urge[d] Congress to pass an appropriate national 'red flag' law, as well as legislation incentivizing states to pass 'red flag' laws of their own." In the interim, the President ordered DOJ to publish a model that would "make it easier for states that want to adopt red flag laws to do so."¹⁵⁸ DOJ published its model legislation on June 7, 2021, along with commentary. The commentary makes clear that DOJ does not "endors[e] any particular formulation of an ERPO statute," nor is the model "intended to provide a comprehensive scheme that could be adopted wholesale."¹⁵⁹ DOJ explained that the model statute "draws from the state laws already in existence" to "identif[y] key provisions that may be important to help ensure fair, effective, and safe implementation for such a law" while also setting out "options for states to consider."¹⁶⁰ As such, the model law does not pick between certain standards where states have differed (for instance, the standard of proof for issuance of an order or the length of time for which an order is effective) and, instead, includes options in brackets based on existing state laws.

The model statute lists categories of persons who can petition for an ERPO: (1) law enforcement officers or attorneys for the state; (2) family members; (3) household members; (4) dating or intimate partners; (5) health care providers; (6) school officials; and (7) "[a]ny other appropriate persons specified by state law."¹⁶¹ Consistent with the features of existing state laws described above, the model statute establishes a mechanism for issuance of an "emergency *ex parte* order" based on "specific facts establishing probable cause that the respondent's possession or receipt of a firearm will pose a [significant danger/extreme risk/other appropriate standard established by state law] of personal injury or death to the respondent or another person."¹⁶² An *ex parte* order under the model law would prohibit the subject of the order from possession, use, purchase, manufacture, or other receipt of a firearm; order the subject to surrender any firearms under his or her possession or control and attendant licenses or permits; and inform the subject of the time and place of hearing to determine whether a final order will be issued.¹⁶³ In addition to the prohibitions, the model law requires a court to issue a warrant concurrently authorizing search for, and seizure of, firearms if the evidence supporting issuance of the *ex parte* order establishes

¹⁵⁶ *E.g., id.* (requiring "reasonable cause" standard for *ex parte* orders and "clear and convincing evidence" for final orders).

¹⁵⁷ *E.g.,* CONN. GEN. STAT. § 29-38c (authorizing issuance of warrant to seize firearms); *see generally* *Commentary for Extreme Risk Protection Order Model Legislation*, DOJ (June 7, 2021), <https://www.justice.gov/doj/reducing-gun-violence/commentary-extreme-risk-protection-order-model-legislation#model>.

¹⁵⁸ *Fact Sheet: Initial Actions*, *supra* note 8.

¹⁵⁹ *Commentary for Extreme Risk Protection Order Model Legislation*, DOJ (June 7, 2021), <https://www.justice.gov/doj/reducing-gun-violence/commentary-extreme-risk-protection-order-model-legislation#model>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

“probable cause that the respondent has access to a firearm.”¹⁶⁴ If authorized, a search under this provision could be executed prior to, or concurrently with, service of the order.¹⁶⁵

For final orders, the model statute authorizes issuance of orders effective for “a period of up to [one year/other appropriate time period specified by state law], after a hearing.”¹⁶⁶ Similar to *ex parte* orders, an order after hearing would prohibit the subject from possession, use, purchase, or other receipt of a firearm and order the subject to surrender any firearms under his or her possession or control along with attendant licenses or permits.¹⁶⁷ Issuance of an order would be based on “[a preponderance of the evidence/other appropriate standard specified by state law] that the respondent’s possession or receipt of a firearm will pose a [significant danger/extreme risk/other appropriate standard specified by state law] of personal injury or death to the respondent or another person.”¹⁶⁸ As with *ex parte* orders, evidence establishing probable cause that the subject of the order has access to a firearm would require the court to issue a warrant for search and seizure of such firearm, which could be served concurrently with or after execution of the search, and subsequent warrants would also be authorized based on probable cause that a subject has gained access to a firearm at a later time.¹⁶⁹

The model statute sets out detailed procedures for notice and the requisite hearing, authorizing continuances and making clear that any *ex parte* order shall remain in effect until the hearing is held (with the possibility of temporary extension pending decision on a final order).¹⁷⁰ Rules for termination and renewal of orders are also provided: the subject of an order would be able to seek termination once during the order’s effective period, based on proof that he or she does not pose the danger or risk serving as the basis for the order, and a petitioner could seek renewal of an order subject to the same standards as the original order.¹⁷¹ Finally, the proposed statute would make clear that a respondent’s failure to receive service or appear at a hearing would not serve as a basis to challenge the order or affect a court’s ability to issue the same.¹⁷²

Beyond the details of the orders and warrants themselves, the model legislation would address certain related considerations. First, orders would be required to be forwarded to the appropriate law enforcement agency for entry into NICS and any state system to be used in conducting background checks for firearm transactions.¹⁷³ Additionally, potentially in response to the concern that permitting non-law enforcement petitions for ERPOs could prompt abuse,¹⁷⁴ the model law

¹⁶⁴ *Id.* Additional warrants may be issued subsequently based on new information. *Id.* If a firearm seized is owned by someone other than the subject of either an *ex parte* order or an order after hearing, the model statute provides a procedure for that person to secure return of the firearm upon affirmation, subject to criminal penalty, that he or she will safeguard the firearm against access by the subject of an order. *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* The court could order psychological evaluation of the respondent as part of the process, to the extent authorized by other law. *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*; for a discussion of current background check requirements, see *supra* “Gun Control Act of 1968.”

¹⁷⁴ Chris Dorsey, *Showdown Looms as Dem’s Gun Control Agenda Likely to Meet Stiff Opposition from Nation’s Sheriffs who Say They Will Not Enforce Unconstitutional Laws*, FORBES (Feb. 18, 2021) (quoting former district attorney from Colorado as questioning whether “a disgruntled ex-lover [who] has a vendetta against their former significant other” could “use these laws as retaliation”).

would establish criminal penalties for those filing applications with information that they know is false or for the purpose of harassment.¹⁷⁵ Criminal penalties for violation of an *ex parte* or final order would also be established.¹⁷⁶

Overall, DOJ's model ERPO statute appears to incorporate core aspects of existing state laws, providing choices on components where state law has diverged (e.g., standards of proof and time limits), though the model law reflects broader access to the ERPO process than some states have chosen to authorize.¹⁷⁷ Whether the model legislation will prompt additional states to enact ERPO laws, or states with such laws to amend them, remains to be seen.

Legislative Branch

Firearms regulation is an issue of perennial interest to Congress. In the 117th Congress alone, dozens of bills have been introduced in both Houses of Congress that would affect existing firearm laws in various ways.¹⁷⁸ Some legislation would seek to strengthen or add to existing requirements,¹⁷⁹ while in other instances, legislative proposals would seek to reduce or limit such requirements.¹⁸⁰ Legislation has also been introduced on several of the topics addressed in this report in relation to other branches of government. For instance, legislation introduced in the 117th Congress on the topic of extreme risk protection orders would, among other things, establish a federal extreme risk protection order regime, incentivize additional states to adopt red flag laws, and/or criminalize possession of firearms by persons who are subject to extreme risk protection orders.¹⁸¹ Multiple bills introduced in the 117th Congress would also address so-called "ghost" guns by amending the definition of "firearm" in the GCA or adding a statutory definition of "frame or receiver," among other things.¹⁸² Furthermore, to date, at least one bill would address short-barreled rifles under the NFA by removing that category of firearm from NFA regulation.¹⁸³

A full accounting of all of the proposals currently before Congress is beyond the scope of this report. Of the various bills introduced in the 117th Congress that address firearms, three have passed the House of Representatives.¹⁸⁴ This report provides context for, and an overview of,

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See, e.g.*, Va. Code Ann. § 19.2-152.13 (limiting petitions to attorneys for the state and law enforcement officers); Fla. Stat. § 790.401(1)(a), (2)(a) (limiting petitions to law enforcement officers and agencies).

¹⁷⁸ *See Firearms and explosives*, GOVTRACK, https://www.govtrack.us/congress/bills/subjects/firearms_and_explosives/5966 (last visited Oct. 18, 2021) (reflecting 153 bills in the 117th Congress).

¹⁷⁹ *E.g.*, Assault Weapons Ban of 2021, H.R. 1808, 117th Cong. (2021) (seeking to prohibit, among other things, possession and transfer of certain semiautomatic assault weapons).

¹⁸⁰ *E.g.*, Hearing Protection Act, S. 2050, 117th Cong. (2021) (seeking to remove silencers from NFA regulation).

¹⁸¹ *See, e.g.*, Federal Extreme Risk Protection Order Act of 2021, H.R. 2377, 117th Cong. (2021); Extreme Risk Protection Order and Violence Prevention Act of 2021, S. 292, 117th Cong. (2021).

¹⁸² *See Ghost Guns are Guns Act*, H.R. 1454, 117th Cong. (2021); *Untraceable Firearms Act of 2021*, H.R. 3088, 117th Cong. (2021).

¹⁸³ *See Home Defense and Competitive Shooting Act of 2021*, H.R. 1758, 117th Cong. (2021).

¹⁸⁴ *See Bipartisan Background Checks Act of 2021*, H.R. 8, 117th Cong. (as passed by House, Mar. 11, 2021); *Enhanced Background Checks Act of 2021*, H.R. 1446, 117th Cong. (as passed by House, Mar. 11, 2021); *Violence Against Women Act Reauthorization Act of 2021*, H.R. 1620, 117th Cong. (as passed by House, Mar. 17, 2021). As of this writing, no bills that would make substantial changes to federal firearms law have passed the Senate.

those bills, which concern the current background check process for firearm transactions and the GCA's possession prohibitions for certain categories of persons related to domestic violence.¹⁸⁵

Background Checks: H.R. 8, H.R. 1446, H.R. 1620

Background checks are required for many, but not all, firearm transactions under federal law, and some firearm transfers may proceed even if a definitive response has not been received regarding a background check that has been initiated.¹⁸⁶ Since background checks became part of federal law in 1993 and NICS went live in 1998, the federal requirements for background checks have remained largely unchanged. Laws passed in 2008 and 2018 focused on making the databases used by NICS more comprehensive, mainly through mandates for federal departments and agencies and monetary incentives and penalties for states tied to submitting records to NICS.¹⁸⁷ In the 117th Congress, the House of Representatives has passed two measures that would alter aspects of the federal background check process itself: H.R. 8 would expand the background check requirement beyond FFLs to most transactions between unlicensed persons, and H.R. 1446 would extend the length of time an FFL must wait before completing a firearm transfer in the case of a "delayed" response from NICS.¹⁸⁸ A third bill, H.R. 1620, discussed in more detail in the next section of this report, would require mandatory reporting to law enforcement agencies of background check denials and default proceed transfers involving categories (and proposed categories) of prohibited persons connected to domestic violence.¹⁸⁹ These bills are largely similar to legislation that passed the House in the 116th Congress.¹⁹⁰

With respect to the scope of transactions for which a background check is required, some states impose their own background check requirements that extend to at least some transactions between private, unlicensed persons.¹⁹¹ Other states do not go beyond what federal law requires,¹⁹² and debates over whether, and to what extent, federal background check requirements should be expanded have existed for years.¹⁹³ Proponents of expanding federal background check requirements have asserted that extending the requirements to many or most unlicensed sales would help prevent those who wish to do harm with guns from obtaining them.¹⁹⁴ Opponents, in

¹⁸⁵ See *supra* "Gun Control Act of 1968."

¹⁸⁶ See *supra* "Gun Control Act of 1968."

¹⁸⁷ See NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 122 Stat. 2559 (2008); Fix NICS Act of 2018, Pub. L. No. 115-141, tit. VI, 132 Stat. 348 (2018).

¹⁸⁸ See Bipartisan Background Checks Act of 2021, H.R. 8, 117th Cong. (as passed by House, Mar. 11, 2021); Enhanced Background Checks Act of 2021, H.R. 1446, 117th Cong. (as passed by House, Mar. 11, 2021).

¹⁸⁹ Violence Against Women Act Reauthorization Act of 2021, H.R. 1620, 117th Cong. §§ 1201-02 (as passed by House, Mar. 17, 2021).

¹⁹⁰ Bipartisan Background Checks Act of 2019, H.R. 8, 116th Cong. (as passed by House, Feb. 27, 2019); Enhanced Background Checks Act of 2019, H.R. 1112, 116th Cong. (as passed by House, Feb. 28, 2019); Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. (as passed by House, Apr. 4, 2019).

¹⁹¹ See *Background Checks*, EVERYTOWN FOR GUN SAFETY, https://maps.everytownresearch.org/navigator/states.html?dataset=background_checks (last visited Aug. 31, 2021) (reflecting that 21 states and the District of Columbia require background checks for gun sales by unlicensed sellers).

¹⁹² *Id.* (reflecting that 29 states do not require background checks for gun sales by unlicensed sellers).

¹⁹³ See, e.g., *Pending Firearms Legislation and the Administration's Enforcement of Current Gun Laws: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 82 (1999) (statement of Eric H. Holder, Jr., Deputy Att'y Gen. of the United States, and James E. Johnson, Under Secretary for Enforcement, Dep't of the Treasury) (discussing asserted ways to "build[] on the success of the Brady Law by expanding its protections").

¹⁹⁴ E.g., Richard A. Oppel Jr. and Adeel Hassan, *How Online Gun Sales Can Exploit a Major Loophole in Background Checks*, N.Y. TIMES (Aug. 13, 2019), https://www.nytimes.com/2019/08/13/us/guns-background-checks.html?mc=aud_dev&ad-

contrast, have argued that additional background checks would not prevent nascent criminals from obtaining firearms from other sources and could be too broad, among other things.¹⁹⁵

H.R. 8, which passed the House on March 11, 2021, would make the current federal background check process applicable to most firearm sales between unlicensed persons by making it unlawful for a non-FFL to directly transfer a firearm to another unlicensed person.¹⁹⁶ For a transfer between unlicensed persons to proceed, an FFL would first have to take possession of the firearm to be transferred and comply with federal background check requirements.¹⁹⁷ The bill would establish a number of exceptions to this general rule, as it would not apply to (1) law enforcement, armed private security professionals, and members of the armed forces, acting within the course and scope of their employment and official duties; (2) loans or bona fide gifts between spouses, domestic partners, and family members, so long as the transferor has no reason to believe the transferee is prohibited from firearm possession or will or intends to use the firearm in a crime; (3) transfers by operation of law upon the death of a person; (4) temporary transfers in an emergency, i.e., where immediately necessary to prevent imminent death or great bodily harm; (5) transfers subject to more-stringent NFA requirements; (6) temporary transfers in the presence of the transferor or at shooting ranges or for hunting, farm pest control, or related activities, so long as the transferor has no reason to believe the transferee is prohibited from firearm possession or will or intends to use the firearm in a crime.¹⁹⁸ Separately, H.R. 8 would require FFLs to notify unlicensed persons to whom they transfer a firearm that further transfers between unlicensed individuals must be effectuated through an FFL in order to comply with background check requirements.¹⁹⁹ Finally, the bill would make clear that it is not to be construed as authorizing the establishment of a national firearms registry or interfering with the authority of a state to enact its own laws regarding background checks (so long as such laws are not inconsistent with federal law).²⁰⁰

Another aspect of the current federal background check process addressed in legislation that has passed the House concerns the legal provision that permits an FFL to proceed with a firearm transfer despite not receiving a definite answer on the legality of the transaction. Under current law, an FFL, upon receipt of a “delayed” response, may proceed with a firearm transfer after three business days have elapsed. This so-called “default proceed”²⁰¹ provision received attention following the murder of nine people at the Emanuel AME Church in Charleston, South Carolina in 2015. According to some reporting, the shooter in that case was prohibited from receiving a

keywords=auddevgate&gclid=Cj0KCQjwpreJBhDvARIsAF1_BU1bm4xc26EVAfwFBIBs8t9VumW6YGyCetbStzSL EDWlcOnp89CH6vwaAltMEALw_wcB&gclsrc=aw.ds (identifying examples of individuals who purchased firearms without background checks and used them to commit violent acts).

¹⁹⁵ E.g., Chris Good, *The Case Against Gun Background Checks*, ABC NEWS (Apr. 10, 2013), <https://abcnews.go.com/blogs/politics/2013/04/the-case-against-gun-background-checks/>; *NRA Members: Universal Background Checks “Not a Solution,” GUNS & AMMO* (May 28, 2013), <https://www.gunsandammo.com/editorial/universal-background-checks/249891>. At least one proposal would seek to extend background checks to gun shows specifically. E.g., *Gun Show Loophole Closing Act of 2021*, H.R. 1006, 117th Cong. § 2 (2021).

¹⁹⁶ Bipartisan Background Checks Act of 2021, H.R. 8, 117th Cong. § 3(a) (as passed by House, Mar. 11, 2021).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* Transfers for hunting, farm pest control, and related activities are additionally subject to the requirements that the transferor have reason to believe all licensing and permit requirements will be complied with and *no* reason to believe the firearm will be used in a place where it is illegal. *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ E.g., *Default Proceeds Replaced by Default Infringement*, *supra* note 73.

firearm but was able to purchase from an FFL the firearm he used in the shooting because NICS failed to return a definitive response to his background check within the three business days.²⁰² Some commentators have called for closing the perceived “loophole” that permitted the Charleston shooter to purchase his weapon,²⁰³ by either extending the length of time for a background check to be completed in cases of delay or eliminating the “default proceed” scenario altogether.²⁰⁴ Opponents of amending federal law have asserted, among other things, that the length of time does not need to be extended because the NICS Section currently continues its investigation after the three-business-day period.²⁰⁵

H.R. 1446, which also passed the House on March 11, 2021, would modify the “default proceed” process by providing a mechanism for an eventual transfer to occur if the FFL does not receive a definitive response from NICS within *ten* business days.²⁰⁶ To proceed with the transfer in such cases, the prospective transferee would be required to submit (either by mail or electronically through a website established by the Attorney General) a “petition for review” certifying that the prospective transferee has no reason to believe he or she is prohibited from purchasing or possessing a firearm and requesting a response within ten business days of submission.²⁰⁷ The Attorney General would be required to provide the petitioning prospective transferee and the FFL with notice of receipt of the petition and “respond on an expedited basis to any such petition.”²⁰⁸ If ten business days elapse from the submission of the petition without a notification from NICS that the transfer would be prohibited, the bill would allow the firearm transfer to go forward.²⁰⁹ In other words, the delay period under the bill might last up to twenty business days.²¹⁰ In an effort to address the fact that background checks remain valid for only thirty calendar days from initial contact under current law,²¹¹ meaning that the extended delay period could result in the original background check request expiring before the firearm could be transferred,²¹² H.R. 1446 would additionally provide that if an FFL receives notification that a transaction may proceed after three business days have elapsed from contacting the system, the FFL may rely on that notification for the longer of thirty calendar days from contact *or* twenty-five calendar days from receipt of the notification.²¹³ In circumstances where no notification is received after ten business days from

²⁰² See Michael S. Schmidt, *Background Check Flaw Let Dylann Roof Buy Gun, F.B.I. Says*, N.Y. TIMES (July 10, 2015), <https://www.nytimes.com/2015/07/11/us/background-check-flaw-let-dylann-roof-buy-gun-fbi-says.html>.

²⁰³ E.g., Jennifer Mascia, *How America Wound up with a Gun Background Check System Built More for Speed than Certainty*, THE TRACE (July 21, 2015), <https://www.thetrace.org/2015/07/brady-bill-amendment-default-proceed-loophole-amendment-nra/>.

²⁰⁴ E.g., *Frequently Asked Questions About the “Charleston Loophole,”* CTR. FOR AM. PROGRESS (Feb. 10, 2021), <https://www.americanprogress.org/issues/guns-crime/reports/2021/02/10/495615/frequently-asked-questions-charleston-loophole/>.

²⁰⁵ *Default Proceeds Replaced by Default Infringement*, *supra* note 73.

²⁰⁶ Enhanced Background Checks Act of 2021, H.R. 1446, 117th Cong. § 2 (as passed by House, Mar. 11, 2021).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See H.R. Rep. No. 116-12, at 2 (2019) (appearing to treat identical language in bill from 116th Congress as establishing successive, rather than concurrent, ten-day periods).

²¹¹ 27 C.F.R. § 478.102(c).

²¹² See *Turning a Right into a Privilege: H.R. 1112 Gives Feds Unfettered Power to Block Gun Sales*, NAT’L RIFLE ASS’N INST. FOR LEGIS. ACTION (Feb. 15, 2019), <https://www.nraila.org/articles/20190215/turning-a-right-into-a-privilege-hr-1112-gives-feds-unfettered-power-to-block-gun-sales> (describing scenario where NICS check might expire prior to transfer with consecutive ten-day periods).

²¹³ H.R. 1446, § 2.

submission of the petition called for in the bill, but prior to the point at which NICS records of the transaction are destroyed, the FFL could rely on the new “default proceed” authorization to transfer the firearm for an additional twenty-five calendar days.²¹⁴ Beyond the changes to the “default proceed” process itself, H.R. 1446 would call for the U.S. Government Accountability Office (GAO), the Director of the FBI, the Attorney General, and the DOJ Inspector General to submit reports to Congress addressing different aspects of the implementation and effects of the bill’s new provisions and the background check process.²¹⁵

H.R. 1620, the Violence Against Women Act Reauthorization Act of 2021, would provide for compulsory reporting of failed background checks for persons falling into domestic-violence-related categories (and an additional category proposed in the bill). “Default proceeds” may be referred to ATF for firearm retrieval and potential prosecution if the transferee was prohibited from acquiring the firearm, as may background check denials if the prospective transferee knowingly made false statements regarding his or her eligibility to receive a firearm.²¹⁶ Reporting a failed background check to state or local law enforcement is not required under current federal law.²¹⁷ Although federal authorities are notified when a prohibited purchaser attempts to buy a firearm and fails a NICS background check, and state and local authorities may be made aware in jurisdictions that employ their own background check systems,²¹⁸ some have argued that mandating reporting of failed NICS checks to all relevant law enforcement authorities would aid in stopping prospective prohibited purchasers “from obtaining guns illegally through unlicensed sales or other means.”²¹⁹ Under H.R. 1620, “default proceed” transfers to persons subsequently determined to fall into a domestic-violence-related prohibited category or proposed category—specifically, persons convicted of misdemeanor crimes of domestic violence or stalking, or subject to certain protection orders—would automatically be reported to the relevant field office of the FBI and state, local, and tribal law enforcement agencies.²²⁰ Additionally, the bill would require the Attorney General to report any failed NICS background check on the basis of one of those three categories to state and local or tribal law enforcement authorities, as well as state, tribal, or local prosecutors “where practicable,” within 24 hours in most cases.²²¹ For at least the report to state law enforcement authorities, specific information regarding the basis for the denial, the location of the attempted firearm transfer, and the identity of the prospective transferee would have to be provided.²²² These provisions might facilitate firearm retrieval and prosecutions of persons who are prohibited from receiving a firearm but who make false statements to an FFL in

²¹⁴ *Id.*

²¹⁵ *See id.* § 3.

²¹⁶ *See supra* notes 74-77 and accompanying text.

²¹⁷ *E.g.*, Press Release, John Cornyn, Senator, Cornyn Introduces Bipartisan Bill to Bolster Background Check System (Mar. 10, 2021), <https://www.cornyn.senate.gov/content/news/cornyn-introduces-bipartisan-bill-bolster-background-check-system> (“Under current law, . . . federal authorities are not required to notify state law enforcement when a prohibited person attempts to buy a gun.”).

²¹⁸ *Id.*

²¹⁹ *Alert Local Law Enforcement of Failed Background Checks*, EVERYTOWN FOR GUN SAFETY, <https://everytownresearch.org/solution/alert-law-enforcement-background-checks/> (last visited Sept. 3, 2021).

²²⁰ *Id.* § 1201(a).

²²¹ *Id.* § 1202(a). Under the bill, the report could be delayed “for so long as is necessary to avoid compromising an ongoing investigation.” *Id.*

²²² *Id.* It is not clear whether all such information would be required to be reported to local or tribal law enforcement authorities and prosecutors; the bill would require only that “the incident” be reported to those officials. *Id.*

order to obtain one, where those persons have committed, or are a threat to commit, domestic violence or related acts.²²³

Prohibited Persons and Domestic Violence: H.R. 1620

Federal law prohibits certain categories of persons from possessing or receiving firearms, as discussed previously,²²⁴ and two of those categories relate to domestic violence: persons convicted of a “misdemeanor crime of domestic violence,” and persons subject to certain restraining orders with respect to an “intimate partner” or child.²²⁵ Both categories are limited in particular ways through additional statutory definitions and requirements. With respect to the “misdemeanor crime of domestic violence” category, a separate definition establishes that the term applies to a misdemeanor under federal, state, or tribal law, involving the use or attempted use of force or threatened use of a deadly weapon,²²⁶ that is committed by²²⁷ (1) a current or former spouse, parent, or guardian; (2) a co-parent; (3) one “who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian”; or (4) “a person similarly situated to a spouse, parent, or guardian.”²²⁸ Although the terms “cohabiting with . . . a spouse” and “similarly situated to a spouse” are not further defined by statute, ATF regulations describe “cohabiting . . . as a spouse” as “the equivalent of a ‘common law’ marriage even if such relationship is not recognized under the law” and “similarly situated to a spouse” as “two persons who are residing at the same location in an intimate relationship with the intent to make that place their home.”²²⁹ Based on these definitional requirements, one who commits a covered violent misdemeanor against another with whom he or she lives and has an ongoing romantic relationship will likely be considered to have the requisite domestic relationship for purposes of the statute.²³⁰ Whether and to what extent the statutory prohibition applies to other romantic relationships is less certain. Caselaw interpreting the relevant terms is fairly limited, but it appears that more casual or short-term romantic relationships could fall outside the scope of the “misdemeanor crime of domestic violence” firearm prohibition.²³¹ Conversely, couples in a “sexual relationship that involves

²²³ Several bills introduced in the 117th Congress would require reporting to law enforcement for *all* failed NICS background checks based on a federal prohibition and/or state law, rather than just for checks related to the domestic-violence-related categories of prohibited persons. *See* Unlawful Gun Buyer Alert Act, H.R. 4804, 117th Cong. (2021); NICS Denial Notification Act of 2021, H.R. 1769 & S. 675, 117th Cong. (2021).

²²⁴ *See supra* “Gun Control Act of 1968.”

²²⁵ 18 U.S.C. § 922(g)(8), (9).

²²⁶ Quintessential examples of such offenses are “run-of-the-mill misdemeanor assault and battery laws.” *Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016).

²²⁷ In a prosecution under Section 922(g)(9), the government must prove that the crime was committed by someone in one of the specified domestic relationships with the victim, but the relationship need not be “a defining element of the predicate offense.” *United States v. Hayes*, 555 U.S. 415, 418 (2009).

²²⁸ *Id.* § 921(a)(33). The definition additionally requires that for a person to be considered convicted of such an offense, they must have been represented by counsel or waived that right; and the case must have been tried to a jury (if in a jurisdiction where that right is applicable) or waived the right to a jury trial. *Id.* § 921(a)(33)(B)(i). Additionally, convictions that are expunged or set aside, as well as offenses that have been pardoned or for which the offender has had his or her civil rights restored, are not considered to meet the definition “unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.” *Id.* § 921(a)(33)(B)(ii).

²²⁹ 27 C.F.R. § 478.11.

²³⁰ *See, e.g., Hernandez v. State Pers. Bd.*, 275 Cal. Rptr. 3d 154, 157 (Cal. Ct. App. 2021) (“Applying the ‘similarly situated to a spouse’ prong, five federal appellate courts have held that an assault against a ‘live-in girlfriend’ qualifies even absent any additional facts about the relationship.”).

²³¹ *Hernandez*, 275 Cal. Rptr. 3d at 159 (“There may well be some overnight relationship too fleeting to qualify; we would have reason to conclude that a single-night tryst is insufficient.”); *cf. White v. Dep’t of Just.*, 328 F.3d 1361,

regularly spending the night together” may be considered “similarly situated” to spouses,²³² as may those in a “long-time close and personal” romantic relationship even in the absence of cohabitation.²³³

With respect to the firearm prohibition applicable to persons subject to certain protection orders, the statute requires that the order restrain “such person from harassing, stalking, or threatening an intimate partner” or a child of the person or intimate partner, or “engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury” to him or herself or a child.²³⁴ The order must have been issued after a hearing of which the person had notice and an opportunity to participate, meaning that temporary orders that may be issued *ex parte* are excluded.²³⁵ Regarding the meaning of “intimate partner,” the term is separately defined as a spouse or former spouse, a co-parent, or “an individual who cohabitates or has cohabited with the person” subject to the order.²³⁶ Whether a person “cohabitates or has cohabited” with another for purposes of the statute is a fact question, and the term appears to encompass a broader range of relationships than those involving cohabitation “as a spouse” under the “misdemeanor crime of domestic violence” provision described above. Thus, for example, one federal court of appeals has held, in an unpublished opinion, that evidence of a relationship “beyond casual dating,” in which the defendant spent most or often all days of the week at his girlfriend’s apartment, had a key and kept personal effects there, and “was able to come and go as he pleased,” was sufficient to establish the cohabitation element.²³⁷ Nevertheless, because the definition of “intimate partner” is limited to spouses, co-parents, and cohabitants, current and former significant others who have never lived together and do not share a child appear to be excluded from the statutory definition.²³⁸

Based on the above definitions and limitations, some commentators have called for legislation to close what they perceive as “loopholes” in the domestic-violence-related federal firearm prohibitions, particularly the limitations that exclude violent misdemeanors committed against, or protection orders entered for the benefit of, some dating partners who have not cohabitated.²³⁹ Additional calls for congressional action have centered on the limitation excluding *ex parte*

1369 (Fed. Cir. 2003) (citing as evidence of a relationship “at least similar to a spousal relationship” that the couple had “expectations of fidelity and monogamy, shared expenses, shared household responsibilities, social activities in common, and discussions about having children”).

²³² *Hernandez*, 275 Cal. Rptr. 3d at 159 (surveying federal cases).

²³³ *Eibler v. Dep’t of Treasury*, 311 F. Supp. 2d 618, 622 (N.D. Ohio 2004).

²³⁴ 18 U.S.C. § 922(g)(8). The order must either (1) include a finding that the person subject to the order is “a credible threat” to the safety of the intimate partner or child; or (2) explicitly prohibit the use, attempted use, or threatened use of physical force reasonably expected to cause bodily injury against the intimate partner or child. *Id.* Specific orders need not precisely track the language of the statute; the requirements may be satisfied through the inclusion of “terms substantially similar in meaning.” *United States v. Sanchez*, 639 F.3d 1201, 1205 (9th Cir. 2011).

²³⁵ 18 U.S.C. § 922(g)(8). The term “*ex parte*” refers to a “court action taken or received by one party without notice to the other, usually for temporary or emergency relief.” *Ex Parte*, Black’s Law Dictionary (11th ed. 2019).

²³⁶ *Id.* § 921(a)(32).

²³⁷ *United States v. Ladouceur*, 578 F. App’x 430, 434 (5th Cir. 2014) (per curiam).

²³⁸ See, e.g., DEP’T OF JUST., CRIM. RESOURCE MANUAL § 1116, <https://www.justice.gov/archives/jm/criminal-resource-manual-1116-prosecutions-under-18-usc-922g8> (last updated Jan. 21, 2020) (“The term ‘intimate partner’ is defined as including a spouse or former spouse, or a person with whom the victim has had a child, but it does not include a girlfriend or boyfriend with whom the defendant has not resided.”).

²³⁹ E.g., *Domestic Violence & Firearms*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/#footnote_190_5621 (last visited Sept. 7, 2021) (arguing that “gap” in law “allows people who have a demonstrated record of committing violence or abuse against a dating partner to lawfully keep and acquire guns”).

protection orders, and some have also asserted that those convicted of misdemeanor “stalking” crimes that would not qualify as domestic violence misdemeanors should be subject to federal firearm prohibitions,²⁴⁰ asserting that stalking an intimate partner is often a predicate to violence.²⁴¹ In response, opponents of expanding federal law on these points have argued that federal law does not contain “loopholes” related to domestic violence, that existing prohibitions on dangerous persons acquiring firearms are sufficient, and that expansion of federal law to cover “dating partners” and misdemeanor “stalking” could introduce broad and subjective legal terms that could be abused.²⁴²

H.R. 1620, which passed the House of Representatives on March 17, 2021, would seek to extend the domestic-violence-misdemeanor and protection-order categories to additional kinds of relationships by amending the definition of “intimate partner” and applying the new definition to both categories of prohibited persons. The bill would specify that in addition to the relationships described previously (spouse or former spouse, co-parent, cohabitant or former cohabitant), the term “intimate partner” “includes” a “dating partner or former dating partner” and “any other person similarly situated to a spouse.”²⁴³ “Dating partner” would be further defined as “a person who is or has been in a social relationship of a romantic or intimate nature with [another],” and the definition would also clarify that “sexual contact” is not required for a person to meet the definition of “intimate partner” under the bill.²⁴⁴ The “intimate partner” term would continue to apply to the firearm prohibition for persons subject to certain protection orders, meaning that the prohibition would now apply to orders that, among other things, restrain a person from harassing, stalking, or threatening a “dating partner or former dating partner” as newly defined.²⁴⁵ H.R. 1620 would also add the “intimate partner” term to the firearm prohibition for persons convicted of misdemeanor crimes of domestic violence,²⁴⁶ resulting in the prohibition applying to certain crimes committed by, among others, a “current or former . . . intimate partner . . . of the victim,” a “person who is cohabiting with or has cohabited with the victim as . . . [an] intimate partner,” or a “person similarly situated to a[n] . . . intimate partner.”²⁴⁷

²⁴⁰ See *id.* (identifying as “key” features of domestic violence firearm prohibitions that they extend to *ex parte* domestic violence protective orders and noting that “stalking is a strong predictor of future violence”); Ann Givens, *Why the Gun Background Check System Fails to Catch Many Domestic Abusers*, THE TRACE (Nov. 6, 2017), <https://www.thetrace.org/newsletter/gun-background-check-system-fails-catch-many-domestic-abusers/> (referring to purported “stalker loophole”). Persons convicted of felonies involving stalking are prohibited by federal law from possessing or receiving firearms under the separate category applicable to convicted felons. See 18 U.S.C. § 922(g)(1).

²⁴¹ *Fact Sheet: Reauthorize the Violence Against Women Act*, EVERYTOWN FOR GUN SAFETY, <https://www.everytown.org/report/reauthorize-the-violence-against-women-act/> (last updated Apr. 28, 2021).

²⁴² Melissa Nann Burke, *Dingell Provision in Violence Against Women Act Again Draws NRA Ire*, DETROIT NEWS (Mar. 17, 2021), <https://www.detroitnews.com/story/news/politics/2021/03/17/dingell-provision-violence-against-women-act-again-draws-nra-ire/4732875001/>; Sheryl Gay Stolberg, *Why the N.R.A. Opposes New Domestic Abuse Legislation*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/us/politics/nra-domestic-violence-congress.html>. For more information on constitutional issues that may be relevant to amending the domestic-violence-related federal firearm prohibitions, see CRS Legal Sidebar LSB10339, *Gun Control: Federal Prohibitions on Domestic Abusers Possessing Firearms and the “Boyfriend Loophole,”* by Michael A. Foster.

²⁴³ Violence Against Women Act Reauthorization Act of 2021, H.R. 1620, 117th Cong. § 801 (as passed by House, Mar. 17, 2021).

²⁴⁴ *Id.*

²⁴⁵ See *id.*

²⁴⁶ A separate amendment to the definition of “misdemeanor crime of domestic violence” would clarify that it includes, in addition to misdemeanors under federal, state, and tribal law, crimes that are misdemeanors under “local” (i.e., municipal) law. *Id.*

²⁴⁷ The multiple layers of definitions would produce some apparent oddities and possibly leave the outer boundaries of some of the applicable relationships unclear—for instance, because the bill would define “intimate partner,” in part, as

Separately, H.R. 1620 would expand the firearm prohibition applicable to those subject to certain protection orders, in two ways: first, the bill would extend the category to orders that restrain a person from “intimidating or dissuading a witness from testifying in court,” and second, the bill would extend the category to persons subject to applicable *ex parte* orders, so long as notice and opportunity to be heard are provided in at least a “reasonable” amount of time after issuance of the order “sufficient to protect the due process rights of the person.”²⁴⁸ H.R. 1620 would also establish an entirely new category of persons who are prohibited from possessing or receiving firearms under federal law: persons convicted of a “misdemeanor crime of stalking.”²⁴⁹ The term “misdemeanor crime of stalking” would be further defined as a misdemeanor under federal, state, tribal, or municipal law that “is a course of harassment, intimidation, or surveillance of another person” that either (1) places the other person “in reasonable fear of material harm to the health or safety” of him or herself, an immediate family member, a household member, or a spouse or intimate partner; or (2) “causes, attempts to cause, or would reasonably be expected to cause emotional distress” to any of those persons.²⁵⁰ Other provisions of H.R. 1620 would make failed firearm background checks on the basis of any of these categories subject to mandatory reporting to law enforcement.²⁵¹

Judicial Branch

Firearm laws and regulations can raise a host of interpretative and constitutional questions that ultimately may have to be resolved in court.²⁵² A discussion of all of the recent judicial opinions addressing issues of statutory or constitutional interpretation germane to federal firearm laws is

a person “similarly situated to a spouse,” and the misdemeanor crime of domestic violence provision would now apply to persons “similarly situated” to intimate partners, one new class of covered relationship would be a person who is “similarly situated” to a person who is “similarly situated to a spouse.” *See id.*; 18 U.S.C. § 921(a)(33)(A)(ii). Likewise, the sub-definition of “dating partner” would result in the inclusion of persons who are “similarly situated” to persons “in a social relationship of a romantic or intimate nature.” H.R. 1620, § 801.

²⁴⁸ H.R. 1620, § 802.

²⁴⁹ *Id.*

²⁵⁰ *Id.* § 801. Mirroring the existing definition of “misdemeanor crime of domestic violence,” the definition of “misdemeanor crime of stalking” would require that for a person to be considered convicted of such an offense, they must have been represented by counsel or waived that right; and the case must have been tried to a jury (if in a jurisdiction where that right is applicable) or waived the right to a jury trial. *Id.* Additionally, convictions that are expunged or set aside, as well as offenses that have been pardoned or for which the offender has had his or her civil rights restored, would not be considered to meet the definition “unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.” *Id.*

²⁵¹ *See supra* notes 216-223 and accompanying text. One other section of H.R. 1620 relevant to the domestic-violence-related categories of persons prohibited from possessing or receiving firearm would seek to “improve enforcement” of the revised prohibitions under the bill by authorizing the Attorney General to (1) appoint special prosecutors to prosecute violations; (2) deputize law enforcement officers to “enhanc[e] the capacity” of ATF to respond to and investigate violations; and (3) establish points of contact within field offices of ATF and local U.S. Attorneys’ offices for law enforcement agencies responding to intimate partner violence cases that may involve violations. H.R. 1620, § 1203. Finally, the bill would require the Attorney General to identify “no less than 75 jurisdictions” with “high rates of firearms violence and threats of firearms violence against intimate partners and other persons protected” by the domestic-violence firearm provisions “and where local authorities lack the resources to address such violence.” *Id.* The bill would then require the Attorney General to make the appointments previously described “in jurisdictions where enhanced enforcement” of the firearm prohibitions “is necessary to reduce firearms homicide and injury rates.” *Id.*

²⁵² For instance, the scope of certain exceptions to the immunity established by the Protection of Lawful Commerce in Arms Act (PLCAA) has been the subject of ongoing litigation on several fronts, in federal and state court. *See, e.g.,* CRS Legal Sidebar LSB10292, *When Can the Firearm Industry Be Sued?*, by Michael A. Foster; Lawrence G. Keane, *Mexico’s Misguided Lawsuit Against American Gun Companies*, NAT’L REV. (Aug. 13, 2021), <https://www.nationalreview.com/2021/08/mexicos-misguided-lawsuit-against-american-gun-companies/>.

beyond the scope of this report.²⁵³ One of the primary constitutional provisions both relevant and unique to firearms regulation is the Second Amendment, which provides that “[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”²⁵⁴ Recently, several federal courts have issued significant decisions regarding the extent to which the Second Amendment permits, or restricts, particular firearm laws.²⁵⁵ The Supreme Court is also poised to hear a Second Amendment case that could potentially clarify the contours of the right to keep and bear arms and/or establish the appropriate test for evaluating Second Amendment challenges to firearm laws.²⁵⁶ This report provides a brief overview of existing Second Amendment doctrine; summarizes three of the recent, notable federal court decisions addressing specific federal and state firearm restrictions; and previews the upcoming case in the Supreme Court.

Second Amendment Background

In its 2008 decision in *District of Columbia v. Heller*, a five-Justice majority of the Supreme Court held that the Second Amendment protects an individual right to possess firearms for historically lawful purposes, including self-defense in the home.²⁵⁷ The *Heller* majority also provided some guidance on the scope of the right, noting that it “is not unlimited” and clarifying that “nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms,” among other “presumptively lawful” regulations.²⁵⁸ As for the types of weapons that may qualify for Second Amendment protection, the Court in *Heller* indicated that the provision presumptively applies to “all instruments that constitute bearable arms” and read its prior case law as limiting coverage to weapons “in common use” at the time—which are protected—and excluding “dangerous and unusual weapons”—which are not.²⁵⁹ Finally, applying its conclusions to the regulations at issue in the case before it—restrictions enacted in the District of Columbia that effectively amounted to a ban on the private possession of operative handguns in the home—the majority in *Heller* struck down the regulations as unconstitutional.²⁶⁰ In so doing, the Court emphasized that D.C.’s regulations made it impossible to use firearms for the Second Amendment’s “core lawful purpose of self-defense” and impermissibly extended into the home, where the need for such defense is “most acute.”²⁶¹

Since *Heller*, the Supreme Court has addressed the Second Amendment only a handful of times, in limited fashion. First, in *McDonald v. City of Chicago*, the Court held that the Second

²⁵³ For discussion of some of the interpretative and constitutional issues beyond the Second Amendment that are relevant to federal firearm laws, see CRS Report R45629, *Federal Firearms Laws: Overview and Selected Legal Issues for the 116th Congress*, by Michael A. Foster.

²⁵⁴ U.S. CONST. amend. II; see Cong. Rsch. Serv., *Second Amendment: Doctrine and Practice*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt2-1/ALDE_00000408/ (last visited Sept. 23, 2021).

²⁵⁵ See, e.g., *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc), *petition for cert. docketed*, No. 20-1639 (U.S. May 25, 2021).

²⁵⁶ See *N.Y. State Rifle & Pistol Ass’n v. Corlett*, 141 S. Ct. 2566 (Mem. Op.) at *1 (Apr. 26, 2021) (order granting petition for writ of certiorari).

²⁵⁷ 554 U.S. 570, 595 (2008).

²⁵⁸ *Id.* at 626–27 & n.26.

²⁵⁹ *Id.* at 627 (citation omitted).

²⁶⁰ *Id.* at 628–36.

²⁶¹ *Id.* at 628–30.

Amendment applies not only to federal firearm laws, but to state and local firearm laws as well through the selective incorporation doctrine²⁶² of the Fourteenth Amendment.²⁶³ Then, in the 2016 decision *Caetano v. Massachusetts*, the Supreme Court vacated a ruling by the Massachusetts Supreme Court upholding a law prohibiting the possession of stun guns.²⁶⁴ In a *per curiam* opinion, the Court held that the Massachusetts Supreme Court's decision was inconsistent with *Heller*, reiterating that the Amendment extends to "bearable arms" that "were not in existence at the time of the founding."²⁶⁵ Most recently, in *New York State Rifle & Pistol Association, Inc. v. City of New York*,²⁶⁶ the Court considered a Second Amendment challenge to New York City regulations that restricted the transport of firearms outside the home²⁶⁷ but ultimately ruled that the case was moot after the laws at issue were changed to permit the petitioners to transport their firearms as requested.²⁶⁸

The Supreme Court's Second Amendment jurisprudence has left several questions unanswered, including what the scope of the right protected by the Second Amendment is and what standard or test courts should use to assess Second Amendment challenges to firearm laws. As described in more detail below, this state of affairs could change with the Supreme Court's decision to grant review in a new Second Amendment case this upcoming term.²⁶⁹ In the interim, the lower federal courts have been left to develop their own analytical frameworks for determining whether firearm laws unconstitutionally infringe on Second Amendment rights. Courts have generally applied a two-part inquiry to review Second Amendment challenges to federal, state, and local gun regulations.²⁷⁰ The two-part inquiry typically asks, at step one, whether the challenged law burdens conduct protected by the Second Amendment, which involves an inquiry into the historical meaning of the right.²⁷¹ If, based on the "historical understanding of the scope of the right,"²⁷² the law does not burden protected conduct, it is upheld.²⁷³ If the challenged law burdens

²⁶² The selective incorporation doctrine provides that certain parts of certain amendments in the Constitution, as determined by the Supreme Court, are applicable to the states through the Due Process clause of the Fourteenth Amendment. 561 U.S. 742, 763-64 (2010).

²⁶³ *Id.* at 791 (plurality op.); *id.* at 806 (Thomas, J., concurring in part and concurring in judgment).

²⁶⁴ 577 U.S. 411, 412 (2016).

²⁶⁵ *Id.* at 411 (quoting *Heller*, 554 U.S. at 582).

²⁶⁶ 140 S. Ct. 1525 (2020).

²⁶⁷ *Id.* at 1526.

²⁶⁸ *Id.*

²⁶⁹ See *infra* "Public Carry of Firearms."

²⁷⁰ See, e.g., *Powell v. Tompkins*, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (collecting cases).

²⁷¹ E.g., *Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016); *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011). Some courts have recognized a safe harbor for the kinds of "longstanding" and "presumptively lawful" regulations that the Supreme Court in *Heller* appeared to insulate from doubt. E.g., *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) ("It seems most likely that the Supreme Court viewed the regulatory measures listed in *Heller* as presumptively lawful because they do not infringe on the Second Amendment right."). In a variation, some courts have treated such regulations not as *per se* constitutional but merely as being entitled to a presumption of constitutionality. See, e.g., *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 686 (6th Cir. 2016) ("*Heller* only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis.")

²⁷² *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc), *petition for cert. docketed*, No. 20-1639 (U.S. May 25, 2021); see also *Nat'l Rifle Ass'n of Am., Inc. v. ATF*, 700 F.3d 185, 204 (5th Cir. 2012) (asking whether "the law harmonizes with the historical traditions associated with the Second Amendment guarantee").

²⁷³ E.g., *Medina v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019) (concluding that, based on historical evidence, "a felony conviction removes one from the scope of the Second Amendment").

protected conduct, a court will apply an appropriate level of scrutiny.²⁷⁴ As explained by the Ninth Circuit, “this two-step inquiry reflects the Supreme Court’s holding in *Heller* that, while the Second Amendment protects an individual right to keep and bear arms, the scope of the right is not unlimited.”²⁷⁵ With respect to the question of what level of “scrutiny” applies to a law that burdens protected conduct under the Second Amendment, the answer generally “depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”²⁷⁶ Put differently, “[i]n ascertaining the proper level of scrutiny, the court must consider: (1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law’s burden on that right.”²⁷⁷

Laws that are “broadly prohibitory” in “restricting the core Second Amendment right”²⁷⁸ (i.e., laws that impose “such a severe restriction” on the Second Amendment’s core as to “amount[] to a destruction of the Second Amendment right”)²⁷⁹ may be, like the restrictions in *Heller*, considered categorically unconstitutional and struck down. Alternatively, laws that threaten or “severely” or “substantially” burden the core of the Second Amendment receive “strict scrutiny,” or something close to it,²⁸⁰ while “less severe” burdens falling beyond the core of the Second Amendment receive “intermediate scrutiny.”²⁸¹ The terms “strict scrutiny” and “intermediate scrutiny” refer to modes of constitutional analysis that “consider the fit between the challenged regulation and its purpose.”²⁸² Strict scrutiny, the most exacting form of review, requires a challenged law to be “narrowly drawn to provide the least restrictive means of furthering a compelling state interest.”²⁸³ Intermediate scrutiny requires a “reasonable” or “substantial” fit between the challenged statute and an “important” government interest.²⁸⁴ In choosing between these standards, what precisely constitutes the “core” of the Second Amendment has produced some disagreement among the circuit courts. Several courts have identified the core right as essentially confined to self-defense in the home,²⁸⁵ but some other courts have viewed the

²⁷⁴ *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). Courts sometimes go on to step two in an “abundance of caution” even if it is doubtful that a challenged law burdens conduct protected by the Second Amendment. *Nat’l Rifle Ass’n*, 700 F.3d at 204; *see Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013) (“[W]e and other courts of appeals have sometimes deemed it prudent to instead resolve post-*Heller* challenges to firearm prohibitions at the second step[.]”).

²⁷⁵ *Id.* (citing *Heller*, 554 U.S. at 626–27).

²⁷⁶ *Nat’l Rifle Ass’n*, 700 F.3d at 195 (quoting *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)).

²⁷⁷ *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016).

²⁷⁸ *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011).

²⁷⁹ *Silvester*, 843 F.3d at 821.

²⁸⁰ *United States v. McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020) (explaining a regulation threatening a right at the core of the Second Amendment “triggers strict scrutiny”); *Ezell*, 651 F.3d at 708–09 (indicating that claim that comes “closer to implicating the core of the Second Amendment right” requires “more rigorous showing” than intermediate scrutiny, “if not quite ‘strict scrutiny’”); *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (“[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification.”).

²⁸¹ *E.g.*, *Nat’l Rifle Ass’n*, 700 F.3d at 195; *Heller II*, 670 F.3d at 1258 (concluding intermediate scrutiny should apply to gun registration laws that do not prevent “an individual from possessing a firearm in his home or elsewhere, whether for self-defense or hunting, or any other lawful purpose”).

²⁸² *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng’rs*, 788 F.3d 1318, 1328 (11th Cir. 2015).

²⁸³ *McGinnis*, 956 F.3d at 754 (citation omitted).

²⁸⁴ *Id.*; *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019).

²⁸⁵ *Kolbe*, 849 F.3d at 138 (framing the core of the right as “the right of law-abiding, responsible citizens to use arms for self-defense in the home”); *see also Kachalsky v. County of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) (“[W]e believe that applying less than strict scrutiny when the regulation does not burden the ‘core’ protection of self-defense

carrying of a firearm for self-defense *outside* the home, at least in some contexts, as falling within the Second Amendment's core.²⁸⁶

Using the two-step framework, the lower federal courts have upheld many firearm regulations, often after concluding that the provisions at issue did not substantially burden the core of the Second Amendment and thus intermediate scrutiny should apply.²⁸⁷ For instance, in a 2020 decision, the U.S. Court of Appeals for the Fifth Circuit²⁸⁸ reaffirmed the constitutionality under the Second Amendment of the federal prohibition on the possession of firearms by persons subject to certain domestic protective orders.²⁸⁹ Assuming at step one that the law at issue implicated the Second Amendment, the court applied intermediate scrutiny at step two, rejecting the defendant's argument that strict scrutiny should apply because the law "completely disarms individuals subject to qualifying protective orders while offering no exception for home-defense or self-defense."²⁹⁰ In the court's view, although the provision is "broad in that it prohibits possession of all firearms, even those kept in the home for self-defense, it is nevertheless narrow in that it applies only to a discrete class of individuals for limited periods of time."²⁹¹ As such, the court concluded that the law did not severely burden Second Amendment rights and, applying intermediate scrutiny, upheld the law based on the government's compelling interest in reducing domestic gun abuse and the "established link between domestic abuse, recidivism, and gun violence."²⁹²

The lower courts' methodology for reviewing firearm laws does not always result in the law at issue being upheld, however. For example, reviewing District of Columbia firearm registration and related requirements, the D.C. Circuit concluded in a 2015 case that some of the requirements at issue, such as a requirement to renew registrations every three years and a prohibition on registering more than one pistol in a 30-day period, did not survive intermediate scrutiny, as the District failed to present sufficient evidence to establish the requisite fit between the requirements and the District's asserted interest in public safety.²⁹³ Likewise, the Second Circuit determined in a 2015 decision that a New York law prohibiting the possession of magazines loaded with more

in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits."); *Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir. 2018) (stating that the right "is at its zenith inside the home" and "is plainly more circumscribed outside the home"); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) ("If Second Amendment rights apply outside the home, we believe they would be measured by the traditional test of intermediate scrutiny.");

²⁸⁶ See *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017) (recognizing that the right of law-abiding citizens to carry a concealed firearm is a core component of the Second Amendment); and *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) ("The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.");

²⁸⁷ See CRS Report R44618, *Post-Heller Second Amendment Jurisprudence*, by Sarah Herman Peck (surveying caselaw through March of 2019). It is likewise possible, though apparently rare, that a firearm law may be upheld under strict scrutiny. See *Mance v. Sessions*, 896 F.3d 699, 707 (5th Cir. 2018) (applying strict scrutiny and upholding federal laws effectively prohibiting direct interstate sales of handguns).

²⁸⁸ This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Fifth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

²⁸⁹ *McGinnis*, 956 F.3d at 759.

²⁹⁰ *Id.* at 756.

²⁹¹ *Id.* at 757.

²⁹² *Id.* at 758. The court also emphasized that the provision is temporally limited and ensures predicate protective orders are subject to due process protections. *Id.*

²⁹³ *Heller v. District of Columbia*, 801 F.3d 264, 277-80 (D.C. Cir. 2015). The court did uphold the basic registration requirements and some of the related requirements, such as appearing in person to register and paying a fee. *Id.* at 277.

than seven rounds of ammunition, with exceptions, did not meet intermediate scrutiny on the record before the court, as the provision was “entirely untethered” from the state’s “stated rationale of reducing the number of assault weapons and large capacity magazines in circulation.”²⁹⁴

Variations in emphasis and outcome even among courts that employ the broad parameters of the two-step Second Amendment framework²⁹⁵ are exemplified in three recent lower-court cases addressing: the constitutionality of a federal law imposing age restrictions on firearms sales;²⁹⁶ state laws restricting the acquisition of assault weapons;²⁹⁷ and the open carry of firearms.²⁹⁸ Federal jurisprudence regarding public carry, and indeed Second Amendment jurisprudence more generally, could also be impacted by the Supreme Court’s decision to review a challenge to state restrictions on concealed-carry licenses.²⁹⁹ This report discusses each topic and case in turn.

Age Restrictions on Firearm Transfer and Possession

Current federal law imposes several age-based restrictions on firearm transfer and possession, as described previously: persons under 18 years of age are generally prohibited from knowingly possessing handguns and handgun ammunition,³⁰⁰ and licensed firearm dealers may not knowingly sell or deliver (1) any firearms or ammunition to minors, or (2) firearms other than shotguns or rifles (or ammunition for the same) to persons under the age of 21.³⁰¹ Some circuits have upheld these restrictions in the face of Second Amendment challenge. In a 2009 decision, the First Circuit upheld the prohibition generally barring juveniles from possessing a handgun, ruling that there was a long tradition of such prohibitions and thus it fell within a *Heller* safe harbor for “longstanding” restrictions on firearm possession.³⁰² Several years later, the Fifth Circuit ruled that the provisions making it unlawful for an FFL to transfer handguns to persons under the age of 21 were also constitutional, determining that they were “consistent with a longstanding, historical tradition” and that, even assuming the provisions did burden conduct protected by the Second Amendment, they would withstand intermediate scrutiny based on a demonstrated “causal relationship between the easy availability of firearms to young people under 21 and [a] rise in crime.”³⁰³

²⁹⁴ N.Y. State Rifle & Pistol Ass’n v. Cuomo, 804 F.3d 242, 264 (2d Cir. 2015). The court in *Cuomo* concluded that one other specific prohibition on a non-semiautomatic firearm failed intermediate scrutiny but upheld other provisions prohibiting possession of semiautomatic assault weapons and large-capacity magazines. *Id.* at 247.

²⁹⁵ For a detailed examination of federal-court Second Amendment decisions through 2016, see David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS L.J. 193 (2017).

²⁹⁶ Hirschfeld v. ATF, 5 F.4th 407 (4th Cir. 2021), *vacated as moot*, No. 19-2250, 2021 WL 4301564, at *2 (4th Cir. Sept. 22, 2021).

²⁹⁷ Miller v. Bonta, ___ F. Supp. 3d ___, No. 19-CV-1537, 2021 WL 2284132 (S.D. Cal. June 4, 2021), *appeal docketed*, No. 21-55608 (9th Cir. June 10, 2021).

²⁹⁸ Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021) (en banc), *petition for cert. docketed*, No. 20-1639 (U.S. May 25, 2021).

²⁹⁹ N.Y. State Rifle & Pistol Ass’n v. Corlett, 141 S. Ct. 2566 (Mem. Op.) at *1 (Apr. 26, 2021) (order granting petition for writ of certiorari).

³⁰⁰ 18 U.S.C. § 922(x)(2). Others also may not knowingly transfer such items to them. *Id.* § 922(x)(1). These prohibitions are subject to several exceptions, such as temporary transfers in the course of employment, ranching or farming activities or for target practice, hunting, or a safety course. *Id.* § 922(x)(3).

³⁰¹ *Id.* § 922(b)(1).

³⁰² United States v. Rene E., 583 F.3d 8, 12-15 (1st Cir. 2009).

³⁰³ Nat’l Rifle Ass’n of Am., Inc. v. ATF, 700 F.3d 185, 207 (5th Cir. 2012). The court viewed intermediate, rather than strict, scrutiny as the appropriate standard because the restrictions amount merely to a temporally limited “age

In a recent decision, the Fourth Circuit in *Hirschfeld v. ATF* disagreed with the Fifth Circuit's earlier analysis and held that the federal provisions barring FFL handgun transfers to persons between 18 and 20 are unconstitutional.³⁰⁴ Applying the two-step inquiry, the court determined that at step one, the Constitution's text, structure, and history established that 18-, 19-, and 20-year olds fall within the Second Amendment's protections.³⁰⁵ At step two, the court assumed that intermediate scrutiny applied and concluded that the challenged laws did not survive it.³⁰⁶ While acknowledging that the government's asserted interests in preventing crime, enhancing public safety, and reducing gun violence were compelling,³⁰⁷ the court determined that the laws were not a reasonable fit to protect those interests.³⁰⁸

On September 22, 2021, the panel vacated its decision in *Hirschfeld*, as the case had become moot once the plaintiff in the case turned 21 and thus was no longer prohibited from buying a handgun from an FFL of her choosing.³⁰⁹ Although the Fourth Circuit's decision lacks precedential value, the court's vacated opinion demonstrates the degree to which, even when applying intermediate, rather than strict, scrutiny, courts may be willing to closely review the evidence proffered to support a gun law challenged under the Second Amendment and strike it down when it finds such evidence to be lacking.

Ban of Certain Semiautomatic Firearms

As part of the Violent Crime Control and Law Enforcement Act of 1994, Congress enacted the Public Safety and Recreational Firearms Act, which implemented a 10-year prohibition on the manufacture, transfer, or possession of "semiautomatic assault weapons," as defined in the act, and large capacity ammunition feeding devices.³¹⁰ The ban, which had several exceptions, expired in 2004.³¹¹ A number of states and localities have restrictions or prohibitions of their own on certain semiautomatic firearms and/or large capacity ammunition magazines, however.³¹² Multiple federal appellate courts have addressed Second Amendment challenges to such provisions and have generally concluded that bans on the items are constitutional.³¹³ For example,

qualification" that does not constitute a "total prohibition on handgun possession and use." *Id.* at 206. Thus, according to the court, the restrictions do not severely burden a right at the core of the Second Amendment. *Id.*

³⁰⁴ *Hirschfeld v. ATF*, 5 F.4th 407, 410 (4th Cir. 2021), *vacated as moot*, No. 19-2250, 2021 WL 4301564, at *2 (4th Cir. Sept. 22, 2021).

³⁰⁵ *Id.* at 421.

³⁰⁶ *Id.* at 440.

³⁰⁷ *Id.* at 441.

³⁰⁸ *Id.* at 443-52.

³⁰⁹ *Hirschfeld*, 2021 WL 4301564, at *2.

³¹⁰ Pub. L. No. 103-322, 108 Stat. 1796, Title XI (1994). The 1994 law listed numerous weapons that qualified as "semiautomatic assault weapons," and also applied to firearms with at least two designated features. *Id.*

³¹¹ Congress has considered a number of proposals over the years to reinstate the ban, with modifications. *E.g.*, Assault Weapons Ban of 2021, H.R. 1808 & S. 736, 117th Cong. (2021).

³¹² See *Assault Weapons*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/assault-weapons/> (last visited Sept. 13, 2021); *Large Capacity Magazines*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/> (last visited Sept. 13, 2021).

³¹³ See *Worman v. Healey*, 922 F.3d 26, 41 (1st Cir. 2019) (addressing Massachusetts ban on semiautomatic assault weapons and large-capacity magazines); *Kolbe v. Hogan*, 849 F.3d 114, 135-37 (4th Cir. 2017) (en banc) (addressing Maryland ban on "assault weapons" and large capacity magazines); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261-64 (2d Cir. 2015) (addressing New York and Connecticut bans on semiautomatic assault weapons and large-capacity magazines); *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 410-12 (7th Cir. 2015) (addressing

in 2017, the Fourth Circuit, sitting *en banc*, affirmed the constitutionality of Maryland’s ban of the AR-15 and other military-style rifles and shotguns (referred to as “assault weapons”), as well as detachable large-capacity magazines.³¹⁴ The court in that case determined at step one of its two-step inquiry that the banned weapons and large-capacity magazines were not the kinds of arms protected by the Second Amendment, relying on language from *Heller* suggesting that “weapons that are most useful in military service—M-16 rifles and the like—may be banned.”³¹⁵ The court also held in the alternative that, even assuming such items would be entitled to Second Amendment protection, Maryland’s prohibitions survived intermediate scrutiny³¹⁶ given evidence that “by reducing the availability of such weapons and magazines overall,” the prohibitions would “curtail their availability to criminals and lessen their use in mass shootings, other crimes, and firearms accidents,” thereby furthering the state’s compelling interest in public safety.³¹⁷

A recent federal district court decision deviated from the appellate courts, holding that California’s ban on certain semiautomatic firearms is unconstitutional.³¹⁸ In *Miller v. Bonta*, the U.S. District Court for the Southern District of California described two tests for assessing the constitutionality of California’s provisions effectively banning certain “modern” weapons (in the court’s terminology)—“principally AR-15 type rifles, pistols, and shotguns.”³¹⁹ In addition to the familiar two-part framework employed in the Ninth Circuit, the court identified a so-called “*Heller* test” for assessing “hardware” bans that asks whether banned hardware is “commonly owned by law-abiding citizens for a lawful purpose.”³²⁰ According to the court:

For the AR-15 type rifle the answer is “yes.” The overwhelming majority of citizens who own and keep the popular AR-15 rifle and its many variants do so for lawful purposes, including self-defense at home. Under *Heller*, that is all that is needed. Using the easy to understand *Heller* test, it is obvious that the California assault weapon ban is unconstitutional. Under the *Heller* test, judicial review can end right here.

Acknowledging that the Ninth Circuit has not adopted this “*Heller* test,” the court then proceeded to apply the “two-step framework” that the appellate court has endorsed.³²¹ Under that framework, the court determined at step one that “a ban on modern rifles has no historical pedigree” that would remove it from the scope of the Second Amendment.³²² Moving to step two, the court viewed the ban as “striking at the acknowledged core of the Second Amendment” by prohibiting possession by “ordinary citizens”³²³ of an entire category of modern firearms

city ordinance banning semiautomatic assault weapons and large capacity magazines); *Heller v. District of Columbia*, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011) (addressing District of Columbia’s ban on semiautomatic rifles and large-capacity magazines)

³¹⁴ *Kolbe*, 849 F.3d at 146.

³¹⁵ *Id.* at 136 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

³¹⁶ The court did not view the ban as severely burdening the core protection of the Second Amendment because it applied only to “certain military-style weapons and detachable magazines, leaving citizens free to protect themselves with a plethora of other firearms and ammunition.” *Id.* at 138.

³¹⁷ *Id.* at 140.

³¹⁸ *Miller v. Bonta*, ___F. Supp. 3d___, No. 19-cv-1537, 2021 WL 2284132 (S.D. Cal. June 4, 2021), *appeal docketed*, No. 21-55608 (9th Cir. June 10, 2021). California law defines an “assault weapon,” to which its restrictions extend, to include a list of specific semiautomatic firearms, Cal. Penal Code § 30510, as well as other semiautomatic firearms with certain listed features. *Id.* § 30515.

³¹⁹ *Miller*, 2021 WL 2284132, at *5.

³²⁰ *Id.* at *6.

³²¹ *Id.* at *8.

³²² *Id.* at *9.

³²³ The court acknowledged a “form of grandfathering” exception for previously registered weapons. *Id.* at *10 n.37.

“everywhere, including in the home for self-defense.”³²⁴ As such, in the court’s view, the ban amounted to “a destruction of the Second Amendment right” that would be unconstitutional under any level of scrutiny.³²⁵ Furthermore, the court ruled that the ban would be unconstitutional even under the intermediate scrutiny standard applied by other courts to similar bans.³²⁶ Though the court acknowledged reduction of gun crime as “a very important objective,” it concluded there was not a reasonable fit between that objective and the relevant legal provisions, citing a lack of exceptions and the failure, in the court’s view, of the Attorney General’s evidence to demonstrate the laws’ effectiveness.³²⁷

Though the Ninth Circuit has issued a stay of the district court’s order and judgment pending the resolution of related appeals,³²⁸ the district court decision reflects ongoing uncertainty regarding the proper framework for assessing Second Amendment challenges to particular firearm restrictions and the disparate outcomes such uncertainty may yield. That said, as discussed below, the Supreme Court may soon provide at least some additional doctrinal guidance.

Public Carry of Firearms

A number of states and localities impose restrictions or require licenses to carry firearms in public openly, concealed, or both.³²⁹ For instance, in the state of Hawaii, residents must obtain a license to carry a firearm in public, and to obtain a license to carry openly, an applicant must demonstrate “the urgency or the need” to carry a firearm, must be of good moral character, and must be “engaged in the protection of life and property.”³³⁰ Constitutional questions remain regarding restrictions on the public carry of firearms because of disagreement regarding the extent to which Second Amendment rights extend beyond the home.³³¹

In a 2012 case, the Seventh Circuit struck down an Illinois ban on carrying ready-to-use guns in public, with exceptions, ruling that the Second Amendment protects a right to bear arms for self-defense that “is as important outside the home as inside” and that the state of Illinois had failed to provide sufficient evidence that its ban was “justified by an increase in public safety.”³³² Likewise, several years later, the D.C. Circuit struck down provisions of the D.C. Code “limiting licenses for the concealed carry of handguns (the only sort of carrying the Code allows)” to persons who could show a “good” or “proper” reason for carrying—such as a “special need for self-protection” based on specific evidence or employment requiring the carrying of cash or

³²⁴ *Id.* at *10.

³²⁵ *Id.*

³²⁶ *Id.* at *11.

³²⁷ *Id.* at *43–*44.

³²⁸ *Miller v. Bonta*, No. 21-55608 (9th Cir. June 21, 2021) (order issuing stay of order and judgment), <https://oag.ca.gov/system/files/attachments/press-docs/Miller%20Order.pdf>.

³²⁹ See *Concealed Carry*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/> (last visited Sept. 13, 2021); *Open Carry*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/open-carry/> (last visited Sept. 13, 2021). Although federal law does not address public carry of firearms in general, it does contain restrictions on the possession of firearms in certain locations (such as federal buildings, 18 U.S.C. § 930) and authorizes concealed carry regardless of state or local law for active or retired law enforcement officers who meet certain requirements. 18 U.S.C. §§ 926B, 926C.

³³⁰ *Young v. Hawaii*, 992 F.3d 765, 773 (9th Cir. 2021) (en banc), *petition for cert. docketed*, No. 20-1639 (U.S. May 25, 2021).

³³¹ See *supra* notes 285–286 and accompanying text.

³³² *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

valuables.³³³ The court viewed the core of the Second Amendment as encompassing an “individual right to carry common firearms beyond the home for self-defense” and, treating the D.C. provisions as a “total ban on most D.C. residents’ right to carry a gun in the face of ordinary self-defense needs,” ruled that the provisions were *per se* unconstitutional without the need to apply a particular level of scrutiny.³³⁴

By contrast, while acknowledging that the Second Amendment may have *some* application outside the home, several other circuits have viewed Second Amendment rights as more circumscribed in that context and have upheld carry restrictions as a result.³³⁵ Most recently, in *Young v. Hawaii*, the Ninth Circuit addressed the aforementioned Hawaii laws limiting open-carry permits to persons “engaged in the protection of life and property” who can demonstrate “the urgency or the need” to so carry.³³⁶ The Ninth Circuit had previously upheld California provisions limiting *concealed* carry licenses to those who could establish “good cause,” among other things, ruling based on an historical analysis that the Second Amendment “does not extend to the carrying of concealed firearms in public by members of the general public.”³³⁷ Another panel of the Ninth Circuit reached a different conclusion with respect to *open* carry in a 2018 opinion in *Young*, holding that the core of the Second Amendment includes a right to carry a firearm openly for self-defense and that Hawaii’s restrictions were unconstitutional as an effective destruction of that right.³³⁸ In March 2021, the full Ninth Circuit rejected the panel’s opinion, holding that, based on historical analysis, Hawaii’s restrictions do not fall within the scope of the right protected by the Second Amendment.³³⁹

The Supreme Court is considering this divergence in the lower courts regarding the constitutionality of restrictions on public carry in *New York State Rifle & Pistol Association v. Bruen*. In *Bruen*, the Court has agreed to review provisions of New York law that require applicants for concealed carry licenses to show, as relevant here, “proper cause.”³⁴⁰ State and federal courts in New York have interpreted “proper cause” to mean either that (1) the applicant wants to use the handgun for target practice or hunting, in which case the license may be restricted to those purposes; or (2) the applicant has a “special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.”³⁴¹ The “special need for self-protection” required for an unrestricted carry license

³³³ *Wrenn v. District of Columbia*, 864 F.3d 650, 655-56 (D.C. Cir. 2017).

³³⁴ *Id.* at 661, 666.

³³⁵ See, e.g., *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (upholding New York handgun licensing scheme requiring showing of “proper cause” to carry concealed in public); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) (upholding similar New Jersey requirements); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (upholding similar Maryland requirements); *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1995 (2017) (upholding similar California requirements); *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018) (upholding similar Massachusetts requirements).

³³⁶ *Young v. Hawaii*, 992 F.3d 765, 773 (9th Cir. 2021) (en banc), *petition for cert. docketed*, No. 20-1639 (U.S. May 25, 2021).

³³⁷ *Peruta*, 824 F.3d at 927.

³³⁸ *Young v. Hawaii*, 896 F.3d 1044, 1052-68, 1071 (9th Cir. 2018), *vacated en banc*, 915 F.3d 681, 682 (9th Cir. 2019).

³³⁹ *Young*, 992 F.3d at 826.

³⁴⁰ N.Y. Penal Law § 400.00(2)(f).

³⁴¹ *Kachalsky v. County of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) (quoting *Klenosky v. N.Y.C. Police Dep’t*, 75 A.D. 2d 793, 793 (1st Dep’t 1980)).

must be something more than a mere generalized desire to protect one's person or property—rather, the applicant must have an “actual and articulable” need for self-defense.³⁴²

In 2018, the New York State Rifle & Pistol Association, a firearms advocacy organization composed of individuals and clubs throughout the state, and two of its individual members filed suit in federal court against relevant New York licensing officials, alleging that the denial of licenses to carry firearms outside the home for self-defense was a violation of the Second Amendment.³⁴³ Specifically, they asserted that although they had been issued restricted licenses to carry for purposes of hunting and target shooting, they had been denied unrestricted licenses because they had only a generalized desire to carry for self-defense outside the home and thus could not establish “proper cause” under New York law.³⁴⁴ The lower courts held that the proper cause requirement did not violate the Second Amendment and upheld the provisions at issue.³⁴⁵ The Second Circuit affirmed dismissal of the Second Amendment claims in summary fashion, relying on its prior precedent upholding the relevant provisions on application of intermediate scrutiny.³⁴⁶ The Supreme Court thereafter granted certiorari in *Bruen* to review whether the state's “denial of petitioners’ applications for concealed-carry licenses for self-defense violated the Second Amendment.”³⁴⁷

Before the Supreme Court, the parties dispute the degree to which the Second Amendment extends beyond the home and, accordingly, the appropriate standard for reviewing Second Amendment challenges such as the one before the Court.³⁴⁸ Broadly, *Bruen* presents an opportunity for the Supreme Court to provide guidance on both of these questions. However the Court may rule on these issues, its decision may inform Congress's ability to legislate in this area—for instance, a holding that Second Amendment rights extend beyond the home could, depending on the context, constrain the scope of permissible regulation of firearms in public. Conversely, were the Court to conclude that carrying a firearm outside the home is not at the core of the Second Amendment, it could signal additional legislative flexibility. The Supreme Court is hearing oral argument in *New York State Rifle & Pistol Association v. Bruen* on November 3, 2021.

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³⁴² *Id.* at 98.

³⁴³ See *N.Y. State Rifle & Pistol Ass'n v. Beach*, 354 F. Supp. 3d 143, 145 (N.D.N.Y. 2018).

³⁴⁴ See *id.* at 146–47 (stating that the individual petitioners sought unrestricted licenses based on their experience and training handling firearms and, in one petitioner's case, robberies in his neighborhood). In the case of the organization, it alleged that at least one of its members would carry a firearm outside the home for self-defense but could not satisfy the proper cause requirement. *Id.* at 146.

³⁴⁵ *Id.* at 148–49; *N.Y. State Rifle & Pistol Ass'n v. Beach*, 818 F. App'x 99, 100 (2d Cir. 2020) (summary order).

³⁴⁶ *Beach*, 818 F. App'x at 100 (relying on *Kachalsky*, 701 F.3d at 86).

³⁴⁷ *N.Y. State Rifle & Pistol Ass'n v. Corlett*, 141 S. Ct. 2566 (Mem. Op.) at *1 (Apr. 26, 2021) (order granting petition for writ of certiorari).

³⁴⁸ See Brief for Petitioners at 39–40, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (July 13, 2021); Brief for Respondents at 19, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (Sept. 14, 2021).

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